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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 David V. Cavan,

10 Plaintiff,

11 v.

12 Robert Maron, et al.,

13 Defendants.
14

No. CV-15-02586-PHX-PGR

ORDER

15 The Court has before it Defendants' Motion to Dismiss Counts I through VI of
16 Plaintiff's Complaint for Failure to State a Claim Pursuant to Rule 12(b)(6) and 9(b)
17 (Doc. 15), Defendants' Request for Judicial Notice (Doc. 16), and Defendants' Motion
18 for Authorization to File Exhibits to Maron Declaration Under Seal (Doc. 17). The
19 Court will grant in part and deny in part the motion to dismiss, will grant the request for
20 judicial notice, and will deny the motion to file under seal.¹

21 **Background**

22 According to the Complaint,² Plaintiff, David Cavan, and Defendants, Robert
23

24 ¹ The Court finds that oral argument would not assist in resolving this matter and
25 accordingly finds the pending motions suitable for decision without oral argument. *See*
26 LRCiv 7.2(f); Fed. R. Civ. P. 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir.
1998).

27 ² In ruling on the motion to dismiss, the Court "accept[s] all factual allegations in
28 the complaint as true and construe[s] the pleadings in the light most favorable to the
nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

1 Maron and Robert Maron Incorporated (“RMI”), entered into an agreement in July 2007
2 (the “initial agreement”) under which Cavan agreed to purchase two rare watches from
3 Defendants: a Patek Philippe Ref 3449 (“Patek 3449”) for \$1,800,000; and a Patek
4 Philippe Ref 2523 (“Patek 2523”) for \$2,100,000; and Defendants agreed to accept
5 eighteen watches owned by Cavan, for a value of \$2,295,000, to be credited towards the
6 purchase price of the two rare watches. (Doc. 1 at 2-3.) Defendants subsequently
7 provided an additional discount of \$150,000 towards the purchase price of the two
8 watches and Cavan made an additional payment of \$150,000. (*Id.* at 3.) This left the
9 remaining balance due from Cavan towards the purchase of the two rare watches at
10 \$1,304,000 as of September 2010. (*Id.*)

11 Defendants did not deliver either the Patek 3449 or the Patek 2523 to Cavan and
12 Cavan alleges that Defendants sold one or both of these watches to another purchaser.
13 (*Id.*) In October 2011, Cavan requested Defendants return to him the eighteen watches
14 and his \$150,000 payment. (*Id.*)

15 In December 2011, Maron told Cavan that Defendants had a different rare watch,
16 a Patek Philippe Ref 2449J 18K 1st Series (“Patek 2449J”) worth over \$2,000,000. (*Id.* at
17 3-4.) Cavan and Defendants then entered into an agreement (the “modification
18 agreement”) under which Cavan would receive the Patek 2449J, rather than the Patek
19 3449 and the Patek 2523, in consideration for the eighteen watches and \$150,000 Cavan
20 had previously delivered to Defendants. The modification agreement was evidenced by a
21 writing signed by Cavan and Maron in December 2011, and provided that the Patek
22 2449J was to be delivered to Cavan on or before January 20, 2012. (*Id.* at 4; *see* Doc. 19-
23 1.)³

24 On or before January 20, 2012, Defendants delivered to Cavan a Patek 2449J
25 watch. More than three years later, in April 2015, Cavan first became aware that the

26
27 ³ Defendants have requested the Court take judicial notice of the initial agreement
28 (Doc. 19) and the modification agreement (Doc. 19-1), both of which are referenced in
the Complaint. Cavan has not opposed the request. The Court will, accordingly, grant
Defendants’ Request for Judicial Notice (Doc. 16).

1 Patek 2449J may not have the original dial, so he had the watch examined and evaluated
2 by a watch expert. (*Id.*). In a written report dated June 26, 2015, the expert confirmed
3 that the original dial on the Patek 2449J had been replaced with an inferior dial. The
4 Patek 2449J with the replaced dial is worth significantly less than the Patek 2449J with
5 the original dial that had been promised under the modification agreement. (*Id.*)

6 In September 2015, Cavan had a watch broker contact Defendants on Cavan's
7 behalf. The broker informed Defendants that the Patek 2449J did not have the original
8 Patek 2449J dial. Maron told the broker that he (Maron) was not sure what had happened
9 but that he (Maron) would "take care of it" and replace the dial on the delivered watch
10 with the original Patek 2449J dial. (*Id.*) In November 2015, Maron admitted he had
11 switched the dial and, again, acknowledged he and RMI were responsible for delivering
12 the original Patek 2449J dial to Cavan and promised to do so. (*Id.*) Defendants did not
13 deliver the original Patek 2449J dial to Cavan and have not returned Cavan's eighteen
14 watches or returned any money to Cavan. (*Id.*)

15 On December 21, 2015, Cavan filed this action against Defendants, bringing
16 claims for breach of contract, breach of the covenant of good faith and fair dealing,
17 breach of fiduciary duty, negligent misrepresentation, fraud, and unjust enrichment.
18 (Doc. 1 at 5-8.) Defendants have moved to dismiss the Complaint. (Doc. 15.)

19 **Discussion**

20 **A. Choice of Law**⁴

21 The parties disagree on the law applicable to this case, with Defendants arguing
22 that California law applies (Doc. 15 at 15-16), and Cavan arguing that Arizona law
23 applies (Doc. 24 at 5-6). Because the case is in this court based on diversity jurisdiction,
24 the Court must apply Arizona's choice of law provisions to resolve this conflict. *See*
25 *Waggoner v. Snow*, 991 F.2d 1501, 1506 (9th Cir. 1993). In a contract action, Arizona

26
27 ⁴ In deciding the choice of law issue, the Court has considered the declarations of
28 Cavan (Doc. 24-1) and Maron (Doc. 18), and the exhibits to Maron's Declaration (Docs.
19, 19-1), in addition to the Complaint (Doc. 1).

1 courts follow the Restatement (Second) of Conflict of Laws (“Restatement”) to determine
2 the applicable law. *Swanson v. The Image Bank, Inc.*, 77 P.3d 439, 441 (Ariz. 2003);
3 *Cardon v. Cotton Lane Holdings, Inc.*, 841 P.2d 198, 202 (Ariz. 1992); *see Bobbitt v.*
4 *Milberg LLP*, 801 F.3d 1066, 1070 (9th Cir. 2015).

5 Under the Restatement, the Court is to apply the law “of the state having the most
6 significant relationship to the parties and the transaction.” *Cardon*, 841 P.2d at 202
7 (citing Restatement § 188). To determine whether Arizona or California has the most
8 significant contacts to the parties and transactions, the Court considers (1) the place of
9 contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4)
10 the location of the subject matter of the contract; and (5) the residence, nationality, place
11 of incorporation, and place of business of the parties. *See* Restatement § 188. “These
12 contacts are to be evaluated according to their relative importance with respect to the
13 particular issue.” *Id.* Further, if the place of negotiation and the place of performance are
14 in the same state, the local law of that state will usually be applied (with exceptions
15 inapplicable to the present case). *See id.*

16 In the present case, a fair reading of the Complaint demonstrates that the initial
17 agreement was negotiated and executed in July 2007 in Phoenix, Arizona. (Doc. 1 at 2
18 (“On or around July 6, 2007, at a face to face meeting in Phoenix, Arizona, Cavan
19 purchased two rare watches from Defendants”; and on that same date, “at a face to face
20 meeting in Phoenix, Arizona, Defendants agreed to accept as trade eighteen watches from
21 Plaintiff.”).) The modification agreement reached in 2011 was negotiated by Defendants
22 and a third party negotiating on behalf of Cavan (*see* Doc. 24-1 at 2). It is not clear
23 where these negotiations occurred. However, Cavan asserts that he executed the
24 modification agreement in Arizona after it was faxed to him at his office in Scottsdale.
25 (Doc. 24-1 at 2.) Cavan’s assertion is consistent with the copy of the modification
26 agreement provided by Defendants, which indicates it was faxed by Cavan from Arizona
27 on December 20, 2011, most likely after Cavan signed the agreement and for the purpose
28 of sending a signed copy to Maron. (*See* Doc. 19-1 (fax stamp indicating faxed on “12-

1 20-2011” at “14:16:33” hours, from “Cavan” at the fax number “480-747-9424”).)

2 Although Maron states in his declaration that the agreement was reached and
3 signed by both himself and Cavan at an “in-person meeting” in California, this is
4 inconsistent with both the fax stamp on the agreement and Cavan’s declaration that states
5 Cavan signed the agreement at his office in Scottsdale. Further, Maron states in his
6 declaration that at this same in-person meeting he delivered to Cavan the Patek 2499J
7 (Doc. 18 at 2), which is inconsistent with the terms of the modification agreement, which
8 state that the watch is to be delivered to Cavan on or before January 20, 2012 (Doc. 191).

9 Based on the allegations in the Complaint, the agreements, and the declarations of
10 Moran and Cavan, the Court finds that the initial agreement was negotiated and executed
11 in Arizona, and that the modification agreement was partially executed in Arizona.

12 As to place of performance, the eighteen watches were delivered by Cavan and
13 accepted by Defendants in Arizona, and the parties indicate that the Patek 2449J was
14 delivered in California. Thus, performance by Cavan occurred in Arizona and
15 performance by Defendants occurred in California.

16 The Court rejects Defendants’ suggestion that the Court look only to the
17 modification agreement in determining whether California or Arizona has the most
18 significant contacts. As noted, Cavan’s performance under the initial agreement – the
19 delivery of the eighteen watches and payment of \$150,000 – became his performance
20 under, and the primary consideration for, the modification agreement. Further, the
21 contractual relationship between the parties began in Arizona with the initial agreement,
22 which was negotiated and executed in Arizona, and the subsequent modification
23 agreement flowed from and arose out of the initial agreement. Thus, the Court looks to
24 both the initial agreement and the modification agreement in determining which state has
25 the most significant contacts with the parties and the transactions.

26 Finally, as to the residence, place of incorporation, and place of business of the
27 parties, according to the Complaint, Cavan is a citizen of Arizona; Moran is a citizen of
28 California; and RMI is a California corporation with its principal place of business in

1 California.

2 The Court finds, based on these factors, that Arizona has the most significant
3 contacts. Accordingly, the Court will apply Arizona law.

4 **B. Motion to Dismiss**

5 **1. Count I - Breach of Contract**

6 To maintain a claim for breach of contract, a plaintiff must demonstrate
7 (1) the existence of a contract, (2) breach of the contract, and (3) resulting damages. *See*
8 *Chartone, Inc. v. Bernini*, 83 P.3d 1103, 1111 (Ariz. Ct. App. 2004). Here, the
9 Complaint alleges that both of the Defendants “materially breached the agreement to
10 provide the Patek Ref 2499J by not providing the original dial and, instead, delivering the
11 Inferior Substituted Watch to Plaintiff Cavan.” (Doc. 1 at 5.) However, the agreements
12 themselves demonstrate that the only parties to the agreements are RMI and Cavan.
13 (Docs. 19 and 19-1.) The initial agreement is on what appears to be an invoice, which
14 has across the top “Robert Maron, Inc., Important Wristwatches” and is signed by Maron.
15 (Doc. 19.) The modification agreement is on what appears to be letterhead, with “Robert
16 Maron, Important Wristwatches” across the top; is signed by “Robert Maron, President,
17 Robert Maron, Inc.”; and, on the bottom in small print the designation “Robert Maron,
18 Inc.” The agreements thus demonstrate that RMI entered a contract with Cavan.

19 Cavan contends that it was his understanding that he was negotiating with Maron
20 both on Maron’s behalf and on behalf of RMI, and that he trusted and relied on Maron
21 and his expertise in entering the agreements. (Doc. 24 at 6-7; Doc. 24-1 at 2-3.) The
22 allegations of the Complaint do not, however, demonstrate how or why Moran, who
23 signed the initial agreement, which was on an RMI invoice, and who signed the
24 modification agreement as president of RMI, would be responsible in his individual
25 capacity for breaching the agreement. The Court will, accordingly, dismiss Moran from
26 the breach of contract claim. Because Cavan may be able to correct the deficiencies in
27 the claim, dismissal will be without prejudice and Cavan will be given leave to amend.

28 **2. Count II - Breach of Covenant of Good Faith and Fair Dealing**

1 “Arizona law recognizes that a party can breach the implied covenant of good
2 faith and fair dealing both by exercising express discretion in a way inconsistent with a
3 party’s reasonable expectations and by acting in ways not expressly excluded by the
4 contract’s terms but which nevertheless bear adversely on the party’s reasonably
5 expected benefits of the bargain.” *Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 435 (Ariz.
6 Ct. App. 2002); *see Rawlings v. Apodaca*, 726 P.2d 565, 569 (Ariz. 1986) (“The essence
7 of that duty is that neither party will act to impair the right of the other to receive the
8 benefits which flow from their agreement or contractual relationship.”)

9 To state a claim for breach of the covenant of good faith and fair dealing against
10 Moran, the Complaint must first demonstrate the existence of a contractual obligation on
11 the part of Moran. *See Rawlings*, 726 P.2d at 569 (“The duty arises by virtue of a
12 contractual relationship.”). As discussed above, the Complaint does not include
13 allegations demonstrating that Moran in his individual capacity was a party to, or
14 otherwise can be held responsible for obligations owed under, the modification
15 agreement. Accordingly, the Court will dismiss this claim as to Moran. However, as
16 with the breach of contract claim, Cavan may be able to correct the deficiencies in the
17 claim as to Moran. Therefore, dismissal will be without prejudice and Cavan will be
18 given leave to amend.

19 As to RMI, a fair reading of the allegations in the Complaint demonstrates (1) that
20 a contractual relationship existed between RMI and Cavan; (2) that RMI was obligated
21 under the agreement to deliver the Patek 2449J with the original dial; (3) that RMI
22 delivered the Patek 2449J with the wrong dial; (4) that RMI knew that it delivered a
23 Patek 2449J with the wrong dial but did not inform Cavan that it had the wrong dial; and
24 (5) that by delivering the Patek 2449J with the wrong dial, RMI either intended to injure
25 Cavan or acted with reckless disregard as to such injury. The allegations demonstrate
26 that RMI acted to impair the right of Cavan to receive the reasonably expected benefit of
27 the agreement and are thus sufficient to state a claim for breach of the covenant of good
28 faith and fair dealing as against RMI.

1 **3. Count III – Breach of Fiduciary Duty**

2 Defendants argue that the Complaint fails to state a claim for breach of fiduciary
3 duty because Defendants did not owe Cavan a fiduciary duty.

4 Under Arizona law, a “fiduciary relationship is a confidential relationship whose
5 attributes include ‘great intimacy, disclosure of secrets, [or] intrusting of power.’”
6 *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 335 (Ariz. Ct. App. 1996)
7 (citation and internal quotations omitted) (alteration in original).). “Mere trust in
8 another’s competence or integrity does not suffice; ‘peculiar reliance in the
9 trustworthiness of another’ is required.” *Id.* (citation omitted). “In a fiduciary
10 relationship, the fiduciary holds ‘superiority of position’ over the beneficiary. This
11 superiority of position may be demonstrated in material aspects of the transaction at issue
12 by a ‘substitution of [the fiduciary's] will.’” *Id.* (citations omitted). Further, reliance on
13 another’s superior knowledge can establish a fiduciary relationship where “the
14 knowledge is of a kind beyond the fair and reasonable reach of the alleged beneficiary
15 and inaccessible to the alleged beneficiary through the exercise of reasonable diligence.”
16 *Id.* at 336.

17 The Complaint alleges that Defendants represented themselves to Cavan “as watch
18 dealers with significant rare watch expertise, who acknowledged and accepted receipt of
19 watches valued at \$2,295,000.00 and \$150,000 cash” from Cavan and that, therefore,
20 “Defendants owed Plaintiff Cavan a fiduciary duty regarding the purchase of the Patek
21 Ref 2449J.” These allegations are insufficient to demonstrate that Defendants owed a
22 fiduciary duty to Cavan. For example, there is no allegation in the Complaint of great
23 intimacy, disclosure of secrets, or the entrusting of power; that Defendants’ knowledge
24 was superior to that of Cavan’s; of the substitution of Defendants’ will for that of Cavan;
25 or that Defendants had superior knowledge “of a kind beyond the fair and reasonable
26 reach” of Cavan and inaccessible to Cavan “through the exercise of reasonable
27 diligence.” *Standard Chartered*, 945 P.2d at 335-36. The Court will therefore dismiss
28 the breach of fiduciary duty claim. However, because Cavan may be able to correct the

1 deficiencies in the claim, dismissal will be without prejudice and Cavan will be given
2 leave to amend.

3 **4. Counts IV and V – Negligent Misrepresentation and Fraud**

4 Defendants argue that Cavan’s Negligent Misrepresentation and Fraud claims are
5 subject to dismissal because (1) the claims are barred by the respective statutes of
6 limitations, and (2) the Complaint fails to plead the claims with the required specificity.

7 **a. Statute of Limitations**

8 In Arizona, the statute of limitations for fraud is three years, *see* A.R.S. § 12-
9 543(3), and for negligent misrepresentation is two years, *Hullett v. Cousin*, 63 P.3d 1029,
10 1034 (Ariz. 2003) (citing A.R.S. § 12–542). The statute of limitations begins to run for
11 both types of claims when the plaintiff knew or through reasonable diligence could have
12 learned of the fraud or the misrepresentation. *Coronado Dev. Corp. v. Superior Court of*
13 *Arizona In & For Cochise Cty.*, 678 P.2d 535, 537 (Ariz. Ct. App. 1984) (fraud); *Barnett*
14 *v. Lincoln Nat. Life Ins. Co.*, 2014 WL 4259482, at *9 (D. Ariz. 2014) (negligent
15 misrepresentation); *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 7 P.3d 979,
16 982 (Ariz. Ct. App. 2000) (“Under the common law ‘discovery rule,’ ‘a cause of action
17 does not accrue until the plaintiff knows or with reasonable diligence should know the
18 facts underlying the cause.’”) (citations omitted). “The burden of establishing that the
19 discovery rule applies to delay the statute of limitations rest[s] on plaintiff.” *Logerquist*
20 *v. Danforth*, 932 P.2d 281, 284 (Ariz. Ct. App. 1996).

21 As Defendants argue, the Complaint in this case shows that the misrepresentation
22 and fraud claims would be barred without the benefit of the discovery rule because the
23 allegations in the Complaint and the modification agreement indicate that the watch was
24 delivered on or before January 20, 2012, more than three years before his action was filed
25 on December 21, 2015. Thus, Cavan has the burden of demonstrating that the discovery
26 rule applies.

27 Defendants argue that Cavan must plead facts in his complaint to demonstrate
28 applicability of the discovery rule and that Cavan has failed to do so. Cavan responds by

1 pointing to paragraphs 21 and 22 of the Complaint and contends that he has met his
2 burden for application of the discovery rule based on these paragraphs. The Court
3 disagrees. These paragraphs merely state that in April 2015, “Plaintiff Cavan first
4 became aware that the [delivered watch] may not have the original dial, so Plaintiff
5 Cavan, at substantial expense, had the watch examined and evaluated by [a] watch
6 expert”; and that, in the expert’s report of June 26, 2015, the expert “confirmed that the
7 original dial on the Patek Ref 2499J had been replaced with an inferior dial.” (Doc. 1 at
8 4, ¶¶ 21, 22.) This is insufficient to demonstrate “(1) the time and manner of discovery
9 and (2) the inability to have made earlier discovery despite reasonable diligence.” *Fox v.*
10 *Ethicon Endo-Surgery, Inc.*, 110 P.3d 914, 921 (Cal. 2005) (citations omitted) (emphasis
11 in original).

12 Cavan’s declaration⁵ does provide additional information, explaining why Cavan
13 did not discover that the watch did not have the original dial when he first received the
14 watch; why and when he first suspected that the watch did not have the original dial; and
15 how and when he confirmed that the watch did not have the original dial. (*See* Doc. 24-1
16 at 3-4.) The declaration does not, however, explain how Cavan exercised reasonable
17 diligence when he did not obtain an independent expert evaluation of the watch until
18 more than three years after he received the watch, particularly in light of his assertion that
19 he has “relatively limited expertise.” (Doc. 24-1 at 3.)

20 In sum, Cavan has not met his burden of establishing applicability of the discovery
21 rule. The fraud and negligent misrepresentation claims will therefore be dismissed.
22 However, because Cavan may be able to amend the complaint to meet his burden,
23 dismissal will be without prejudice and Cavan will be given leave to amend.

24 **b. Rule 9(b) Particularly Requirement**

25 Both negligent misrepresentation and fraud claims must be pled with particularity
26 under Federal Rule of Civil Procedure 9(b). *389 Orange St. Partners v. Arnold*, 179 F.3d

27 ⁵ For purposes of this pending motion to dismiss, the Court assumes, without
28 deciding, that it can look outside the Complaint to determine whether Cavan has met his
burden for application of the discovery rule.

1 656, 663 (9th Cir. 1999) (requiring state law claim for fraudulent concealment to be pled
2 with particularity under Rule 9(b)); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106
3 (9th Cir. 2003) (“It is established law, in this circuit and elsewhere, that Rule 9(b)’s
4 particularity requirement applies to state-law causes of action.”); *Neilson v. Union Bank*
5 *of Cal., N.A.*, 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003) (“It is well established in the
6 Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule
7 9(b)’s particularity requirements.”).

8 Rule 9(b) requires a plaintiff to “state with particularity the circumstances
9 constituting the fraud or mistake.” Fed. R. Civ. P. 9(b). To meet this requirement, the
10 circumstances constituting the alleged fraud must “be specific enough to give defendants
11 notice of the particular misconduct ... so that they can defend against the charge and not
12 just deny that they have done anything wrong.” *Vess v. Ciba-Geigy Corp. USA*, 317
13 F.3d 1097, 1106 (9th Cir. 2003) (citations and internal quotation marks omitted). The
14 allegations must include “the who, what, when, where, and how” of the misconduct
15 charged and “must set forth more than the neutral facts necessary to identify the
16 transaction. The plaintiff must set forth what is false or misleading about a statement, and
17 why it is false.” *Id.*

18 Cavan contends that the Complaint meets the particularity requirement, citing
19 paragraphs 20, 44, 51, 53, and 54 of the Complaint. These paragraphs state (1) that
20 Maron represented to Cavan that Defendants would deliver to Cavan an original Patek
21 2499J valued at substantially over \$2,000,000; (2) that Defendants delivered a Patek
22 2499J to Cavan that was not the Patek 2499J previously described to Cavan in that the
23 original dial had been replaced with an inferior dial; (3) that Defendants knew that the
24 Patek 2499J delivered to Cavan did not have the original dial; (4) that Defendants had
25 replaced the original dial with an inferior dial in the hopes that Cavan would not discover
26 that the delivered 2499J had the wrong dial. (Doc. 1 at ¶¶ 20, 44, 51, 53, 54.) Although
27 the allegations provide details regarding the circumstances of the alleged fraud, missing
28 from the Complaint are details regarding the when, where, and how the representation

1 was made by Maron that Defendants would deliver to Cavan an original Patek 2449J
2 valued at substantially more than \$2,000,000. Therefore, the Court will dismiss the fraud
3 and negligent misrepresentation claims for this additional reason. However, because
4 Cavan may be able to correct this deficiency, dismissal will be without prejudice and
5 Cavan will be given leave to amend.

6 **c. Punitive Damages**

7 Defendants argue that the allegations in the Complaint are insufficient to create an
8 entitlement to punitive damages. It is the Court's policy to resolve the issue of the
9 propriety of punitive damages through the resolution of objections to jury instructions
10 and/or through the resolution of a motion for judgment as a matter of law pursuant to
11 Fed. R. Civ. P. 50. Therefore, the Court will deny without prejudice dismissal of the
12 request for punitive damages.

13 **5. Count VI – Unjust Enrichment**

14 Defendants argue that the unjust enrichment claim is barred by a two-year statute
15 of limitations. Cavan argues that a three-year statute of limitations applies to his unjust
16 enrichment claim. (*See* Doc. 24 at 10-11 (citing A.R. S. § 12-543(1).)

17 There appears to be a conflict in Arizona as to the length of the limitations period
18 for an unjust enrichment claim, with some cases citing A.R.S. § 12-550 for a four-year
19 limitations period, and other cases citing A.R.S. § 12-543(1) for a three-year limitations
20 period. *See, e.g., Rzendzian v. Marshall & Ilsley Bank*, 2014 WL 3610897, at *4 (Ariz.
21 Ct. App. 2014) (citing § 12-550 for four years); *San Manuel Copper Corp. v. Redmond*,
22 445 P.2d 162, 166 (Ariz. Ct. App. 1968) (same); *Costanzo v. Stewart*, 453 P.2d 526, 529
23 (Ariz. Ct. App. 1969) (citing A.R.S. § 12-543 for three years); *see also Atkins v. Calypso*
24 *Sys., Inc.*, 2015 WL 5856881, at *9 (D. Ariz. 2015) (recognizing that the limitations
25 period is three or four years). The Court will assume that Cavan is correct and that the
26 limitations period is three years.

27 Cavan does not deny that he filed this action more than three years after he
28 received the watch, but argues that the statute of limitations was tolled until he

1 discovered that the watch did not have the original dial. The Court agrees that the
2 discovery rule may apply to Cavan’s unjust enrichment claim, which alleges that
3 Defendants switched the dial on the watch in the hopes that Cavan would not discover
4 that the watch did not have the original dial. *See Rzendzian v. Marshall & Ilsley Bank*,
5 2014 WL 3610897, at *4 (Ariz. Ct. App. 2014) (applying discovery rule to unjust
6 enrichment claim); *see also Mohave Elec. Co-op., Inc. v. Byers*, 189 Ariz. 292, 310, 942
7 P.2d 451, 469 (Ct. App. 1997) (“Generally, wrongful concealment will toll the Statute of
8 Limitations.”) (citing *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 159, 871 P.2d 698, 706,
9 (App.1994)). However, as noted above, Cavan has not met his burden of establishing
10 applicability of the discovery rule. Because Cavan may be able to amend the complaint
11 to meet his burden, dismissal will be without prejudice and Cavan will be given leave to
12 amend.

13 **C. Motion to File under Seal**

14 Defendants move to file the initial agreement and modification agreement under
15 seal. The Court will deny the motion.

16 There is a strong presumption in favor of public access to papers filed in the
17 district court. *See Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). A party
18 seeking to file materials under seal bears the burden of overcoming that presumption by
19 showing that the materials are deserving of confidentiality. *See Foltz v. State Farm Mut.*
20 *Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2005). Specifically, a party must “articulate
21 compelling reasons supported by specific factual findings that outweigh the general
22 history of access and the public policies favoring disclosure.” *Kamakana, City and*
23 *County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (internal citations omitted).

24 Here, Defendants make only general assertions that the agreements contain “terms
25 of business that are proprietary to RMI” that “RMI uses in carrying out its business,” and
26 that the public disclosure of the agreements could “potentially harm RMI” and be
27 “damaging to RMI.” Moreover, although the modification agreement does state that the
28 terms of the “settlement” agreement are to be kept confidential, the initial agreement

1 contains no indication that it was to be kept confidential.

2 Neither Defendants' general assertions nor the terms of the agreements themselves
3 overcome the presumption in favor of public access to court documents. (Doc. 17 at 3;
4 Doc. 18 at 2-3.) Accordingly, Defendants' motion to file under seal will be denied.

5 IT IS ORDERED that Defendants' Motion to Dismiss Counts I through VI of
6 Plaintiff's Complaint for Failure to State a Claim Pursuant to Rule 12(b)(6) and 9(b)
7 (Doc. 15) is granted in part and denied in part as follows:

8 The breach of contract and breach of the covenant of good faith and fair
9 dealing claims against Moran are dismissed without prejudice and with leave to
10 amend.

11 The breach of fiduciary duty, negligent misrepresentation, fraud, and unjust
12 enrichment claims against Moran and RMI are dismissed without prejudice and
13 with leave to amend.

14 The Motion to Dismiss is otherwise denied.

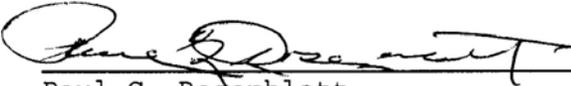
15 IT IS FURTHER ORDERED that Plaintiff may file an amended complaint no
16 later than May 13, 2016.

17 IT IS FURTHER ORDERED that Defendant's Request for Judicial Notice in
18 Support of Motion to Dismiss (Doc. 16) is granted.

19 IT IS FURTHER ORDERED that the Motion for Authorization to File Exhibits to
20 Maron Declaration Under Seal (Doc. 17) is denied.

21 IT IS FURTHER ORDERED that the Clerk of the Court shall unseal and file
22 Exhibits A and B to Maron Declaration (Doc. 19, Doc. 19-1).

23 Dated this 25th day of April, 2016.

24 

25 Paul G. Rosenblatt
26 United States District Judge