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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STEPHEN D BARD,  
  
Plaintiff,  
  
v.

GSV ASSET MANAGEMENT, LLC, et al.,  
  
Defendants.

Case No. [23-cv-00488-WHO](#)

**ORDER GRANTING DEFENDANTS’  
MOTIONS TO DISMISS**  
Re: Dkt. Nos. 13, 15

**INTRODUCTION**

Plaintiff Stephen D. Bard (“Bard”) brought an action for breach of contract, fraud, and intentional interference with contractual relations against GSV Asset Management, LLC (“GSVAM”), Michael T. Moe (“Moe”), SuRo Capital Corporation (“SuRo”) and Mark Klein (“Klein”) stemming from the execution and implementation of a Repurchase Agreement entered by Bard and GSVAM. GSVAM and Moe filed a joint motion to dismiss the reformation, fraud, and aiding and abetting fraud counts asserted against them, as well as to dismiss “the request for punitive damages.” GSVAM and Moe Motion to Dismiss (“GSVAM Mot.”) [Dkt. No. 13] at 1. This motion did not seek to dismiss the breach of contract and breach of implied covenant counts against GSVAM. Separately, Klein and SuRo filed a joint motion to dismiss the two counts asserted against them. SuRo and Klein Motion to Dismiss (“SuRo Mot.”) [Dkt. No. 15].

1 At the hearing on May 31, I ordered the parties other than SuRo to make comprehensive  
2 initial disclosures including communications between the parties pertaining to Bard or the  
3 disputed Repurchase Agreement. Civil Minutes, [Dkt. No. 42]. I also gave plaintiff leave to  
4 amend his complaint. *Id.*

5 On June 13, Bard voluntarily dismissed all claims against defendants SuRo and Klein, with  
6 prejudice. Notice re Voluntary Dismissal, [Dkt. No. 45]. This dismissal renders moot the Motion  
7 to Dismiss filed by SuRo and Klein A, and it is **DENIED** as moot. On June 24, Bard filed an  
8 amended complaint against GSVAM, Moe, and three new defendants. First Amended Complaint,  
9 Dkt. No. 48]. The Motion to Dismiss filed by Moe and GSVAM regarding the original complaint  
10 is perhaps rendered moot by changes in the FAC, but to the extent it is not, the motion is  
11 **GRANTED** for the reasons discussed below.

### 12 **FACTUAL BACKGROUND**

13 Bard's Complaint makes the following allegations, which I accept as true for purposes of  
14 the motion to dismiss. Bard co-founded two companies with Michael T. Moe ("Moe"): GSV  
15 Asset Management, LLC ("GSVAM") and SuRo Capital Corporation ("SuRo"). Complaint  
16 ("Compl.") [Dkt. 1-1] at 1; ¶¶ 13-14. GSVAM is an investment management firm servicing  
17 accredited institutions and high-net-worth individuals *Id.* ¶ 2. For most of the companies' history,  
18 SuRo has been GSVAM's largest client and revenue source, based on an Investment Advisory  
19 Agreement between the companies. ¶ 14. Bard served as Chief Financial Officer (CFO) and  
20 Chief Compliance Officer (CCO) at SuRo and as Chief Operating Officer (COO) at GSVSM until  
21 a dispute arose between Bard and Moe which led Bard to depart both companies in 2014. ¶¶ 15-  
22 16.

23 On September 18, 2017, pursuant to a legal settlement, Bard and GSVAM executed a  
24 Repurchase Agreement whereby Bard surrendered his interest in GSVAM in exchange for \$5  
25 million. Bard received \$1.5 million of the purchase price up front and was entitled to monthly  
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1 payments of approximately \$29,000 until the debt was paid. ¶ 18. The Repurchase Agreement  
2 contains a provision that allows for a reduction of payments to Bard when trailing twelve-month  
3 revenues (“TTM revenues”) from certain entities falls below \$2.5 million.

4 (a) if, following the date hereof, the aggregate revenues earned during  
5 the twelve-month period immediately prior to a Pay Due Date (such  
6 trailing twelve-month revenues shall be recognized on an accrual  
7 accounting basis in accordance with U.S. Generally Accepted  
8 Accounting Principles, as of the calendar month preceding such Pay  
9 Due Date, as determined from time to time, the “Aggregate TTM  
10 Revenues”), received by the Company from the entities identified on  
11 Annex A hereto (the “Identified Entities”) decreases below  
12 \$2,500,000 at any time or from time to time during any year, then the  
13 amount of the Recurring Payment Amount shall be reduced to an  
14 amount equal to the product obtained by multiplying (i) the Aggregate  
15 TTM Revenues times (ii) ten percent (10%) times (iii) one-twelfth  
16 (1/12);

17 Repurchase Agreement [Dkt. 18-1] at 3 § 3.1(a). The entities identified in Annex A include GSV  
18 Capital Corp., now known as SuRo. *Id.* at 20.

19 In March 2019, SuRo announced that it was terminating its contract with GSVAM. ¶ 35.  
20 SuRo explained during an earnings call that instead of using GSVAM as an outside vendor, SuRo  
21 was internalizing the functions formerly served by GSVAM. *Id.* The repurchase agreement  
22 contains a provision titled “No Frustration of Purpose.” ¶ 20; §10.4. One example specifically  
23 contemplated by this provision is a scenario where GSVAM personnel provide similar services to  
24 SuRo within two years after GSVAM ceases providing such services. §10.4; ¶21.

25 SuRo hired several GSVAM personnel, included Allison Green, formerly SVP of Finance  
26 and Controller at GSVAM, who became CFO at SuRo, Jackson Stone, who had serviced SuRo  
27 while at GSVAM and took a senior role at SuRo, and Defendant Klein, who became CEO of  
28 SuRo. Compl. ¶ 36. These personnel were hired to perform the same tasks that GSVAM had  
previously done for SuRo. *Id.*

In September 2022, GSVAM stopped making payments to Bard without prior notice. ¶ 45.  
\$1.8 million remained outstanding on the original purchase price. ¶ 46. This occurred after

1 current CFO and CCO of GSVAM William Vastardis abruptly emailed Bard on September 7,  
2 2022, claiming that GSVAM had been “overpaying you each month for the past two years.” ¶ 42  
3 Vastardis attached spreadsheets purporting to show that TTM revenues (described as “Bard  
4 Revenue” on the spreadsheets) had dropped to \$0 in 2021. ¶ 44. GSVAM has refused to  
5 elaborate on the content of these spreadsheets and has failed to provide Bard with a copy of its  
6 audited financial statements despite being required to do so under the agreement. Repurchase  
7 Agreement § 3.1(e). ¶ 50.  
8

9 Bard alleges that he had an oral agreement with Klein, not memorialized in the executed  
10 Repurchase Agreement, that Moe would transfer his individual interests in the companies listed at  
11 Annex A to GSVAM. ¶ 88. Bard alleges that there was written evidence of this agreement in  
12 GSVAM’s files, which he accessed through a data room terminal set up during the litigation  
13 settled by the Repurchase Agreement. *Id.* The Repurchase Agreement does acknowledge Bard’s  
14 reliance on information contained in a “data room.” ¶ 24. Specifically, § 7.10 states that GSVAM  
15 “acknowledges that the Seller determined the Upfront Payment Amount and the Recurring  
16 Payment Amount based on the information supplied by the Company in the Merrill Corporation  
17 ‘DataSite Project Pegasus Dataroom 2017’ that the Seller was invited to access beginning on May  
18 8, 2017 (the ‘Data Room’), including but not limited to management presentations, due diligence  
19 discussions, estimates, projections or forecasts involving the Company and the Identified Entities.  
20 The Company acknowledges and represents that the information in the Data Room was true and  
21 accurate as of the date posted to the Data Room.” Repurchase Agreement § 7.10.  
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24 The spreadsheet that Vastardis provided to Bard distinguished between revenue that  
25 GSVAM counted toward for purposes of its payments to Bard and other revenue that did not.  
26 ¶ 44. While the spreadsheet indicated that GSVAM’s “Bard Revenue” in 2021 was zero, its  
27 “Non-Bard Revenue” was high enough not to trigger any application of the Repurchase  
28 Agreement’s temporary payment reduction provision. *Id.* Bard’s complaint does not specifically

1 allege that the difference between “Bard Revenue” and “Non-Bard Revenue” was attributable to  
2 Moe’s failure to transfer his interests to GSVAM as the parties had allegedly agreed.

3 **LEGAL STANDARD**

4 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint  
5 if it fails to state a claim upon which relief can be granted. To survive a Rule  
6 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief that is  
7 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially  
8 plausible when the plaintiff pleads facts that “allow[] the court to draw the reasonable inference  
9 that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
10 (2009) (citation omitted). There must be “more than a sheer possibility that a defendant has acted  
11 unlawfully.” *Id.* While courts do not require “heightened fact pleading of specifics,” a plaintiff  
12 must allege facts sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550  
13 U.S. at 555, 570.

14  
15 In deciding whether a claim has been stated upon which relief can be granted, the court  
16 accepts all factual allegations as true and draws all reasonable inferences in favor of the  
17 plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). “[A]llegations that are  
18 merely conclusory, unwarranted deductions of fact, or unreasonable inferences,” however, need  
19 not be “accept[ed] as true.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008)  
20 (internal quotation omitted).

21  
22 Rule 9(b) of the Federal Rules of Civil Procedure imposes a heightened standard for  
23 alleging fraud or mistake: “a party must state with particularity the circumstances constituting  
24 fraud or mistake.” Fed. R. Civ. P. 9(b). This standard applies even where a complaint does not  
25 expressly plead fraud but makes claims that “sound in fraud.” *Vess v. Ciba-Geigy Corp. USA*, 317  
26 F.3d 1097, 1103-04 (9th Cir. 2003). To satisfy the heightened pleading standard, a plaintiff must  
27 describe the “who, what, when, where, and how” the fraud or mistake occurred to avoid factually  
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1 baseless claims and to “give defendants notice of the claims asserted against them.” *Id.* at 1106.

2 If the court dismisses a complaint, it “should grant leave to amend even if no request to  
3 amend the pleading was made, unless it determines that the pleading could not possibly be cured  
4 by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000)  
5 (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). In making this determination,  
6 the court should consider factors such as “the presence or absence of undue delay, bad faith,  
7 dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to  
8 the opposing party and futility of the proposed amendment.” *Moore v. Kayport Package Express*,  
9 885 F.2d 531, 538 (9th Cir. 1989) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

## 11 DISCUSSION

### 12 I. GSVAM AND MOE’S MOTION TO DISMISS

#### 13 A. Fraud and Aiding and Abetting Fraud

14 Where a plaintiff alleges fraud against multiple defendants, he is required to plead facts  
15 providing “each and every defendant with enough information to enable them ‘to know what  
16 misrepresentations are attributable to them and what fraudulent conduct they are charged with.’”  
17 *Vega v. JP Morgan Chase Bank, N.A.*, 654 F. Supp. 2d 1104, 1115 (N.D. Cal. 2009) (citation  
18 omitted). To support his claim of fraud, Bard only asserts that Klein made a misrepresentation to  
19 him when negotiating the Repurchase Agreement, and that he was acting as an agent for GSVAM  
20 and Moe in doing so. “Under California law, the elements of common law fraud are  
21 ‘misrepresentation, knowledge of its falsity, intent to defraud, justifiable reliance, and resulting  
22 damages.’” *Rosal v. First Fed. Bank of Cal.*, 671 F. Supp. 2d 1111, 1131 (N.D. Cal. 2009).  
23 Bard’s claims against GSVAM and Moe rely on an agency relationship because there is no  
24 indication that GSVAM and Moe had actual knowledge of any misrepresentations made by Klein.  
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26 Bard cites a specific misrepresentation made by Klein on a phone call in August 2017.  
27 The representation was that Moe would transfer his personal ownership interest and entitlement to  
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revenue from the entities listed in Annex A of the Repurchase Agreement to GSVAM. ¶ 29. Bard further alleges that this agreement was memorialized in a document that he viewed in the data room. However, in his initial complaint, Bard did not have sufficient information about communications between Klein and defendants GSVAM and Moe to sufficiently establish that they had knowledge of this representation, or that it should otherwise be attributed to them. Bard also does not plead sufficient facts to establish reasonable reliance upon Klein’s representation. Given Bard’s sophistication as a high-level officer of two financial services companies and Bard’s history with the defendants, more is needed to establish why it was reasonable for him to rely upon oral representations rather than ensure that the representations were memorialized in the written agreement.

For the same reasons, Bard also fails to state a claim for aiding and abetting. For it, Bard must plead with particularity that GSVAM and Moe both “knew” of and “gave substantial assistance” to the fraud. *Bradshaw v. SLM Corp.*, 652 F. App’x 593, 594 (9th Cir. 2016). Bard does not adequately plead these required elements for his fraud-based claims against either party. Even if Klein was acting as an agent for GSVAM and Moe, Bard cites no evidence suggesting that these parties knew of this representation by Klein, nor that they gave any assistance, aside from GSVAM’s execution of the negotiated agreement.

**B. Request for Reformation**

Because this remedy is premised on fraud or mistake, Bard must meet Rule 9’s heightened pleading standard when moving for reformation. Fed. R. Civ. P. 9(b); see *Jensen v. Quality Loan Serv. Corp.*, 702 F. Supp. 2d 1183, 1197 (E.D. Cal. 2010). He must show “what the real agreement was, what the agreement as reduced to writing was, . . . where the writing fails to embody the real agreement[,] how the mistake was made, whose mistake it was, and what brought it about.” *Phillips Med. Capital, LLC v. Med. Insights Diagnostics Ctrs., Inc.*, 471 F. Supp. 2d 1035, 1047 (N.D. Cal. 2007) (quoting *Lane v. Davis*, 172 Cal. App. 2d 302, 309 (1959)). He

1 alleges that the agreement was for Moe to transfer his personal interests to GSVAM, and that the  
2 written agreement failed to embody this representation by Klein. For the same reasons discussed  
3 above, Bard has not pleaded sufficient facts to meet Rule 9’s heightened pleading standard.

4 **C. Punitive Damages**

5 Punitive damages may be awarded in an action not arising in contract only if the plaintiff  
6 proves by clear and convincing evidence that defendant is guilty of oppression, fraud, or malice.  
7 Cal. Civ. Code § 3294 (2017); *Stewart v. Truck Ins. Exchange*, 21 Cal. Rptr. 2d 338, 347 (Cal.  
8 1993). Because the fraud claims are dismissed, it is necessary to dismiss the request for punitive  
9 damages as well. *See Lee v. Kitchables Prods.*, No. 21-cv-01913-HSG, 2021 U.S. Dist. LEXIS  
10 140045, at \*9 (N.D. Cal. July 27, 2021).

11 **D. Statute of Limitations**

12 The applicable statute of limitations for Bard’s fraud claim is three years. Cal. Code Civ.  
13 Proc. § 338(d). “An action for relief on the ground of fraud or mistake. The cause of action in that  
14 case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts  
15 constituting the fraud or mistake.” *Id.* The statute of limitations begins to run when Bard  
16 sustained “harm.” *Mayhew Plaza Woodland Hills II, LLC v. Kelsey*, No. G055668, 2019 WL  
17 2295784, at \*8 (Cal. Ct. App. May 30, 2019). Where the harm was not discovered immediately,  
18 plaintiffs must “specifically plead facts to show (1) the time and manner of discovery and (2) the  
19 inability to have made earlier discovery despite reasonable diligence.” *Rosa v. First Fed. Bank of*  
20 *Cal.*, 671 F. Supp. 2d 1111, 1131–32 (N.D. Cal. 2009).

21 Only SuRo and Klein raised the statute of limitations defense in their motion, which is now  
22 moot. I will not address this issue now, other than to note that it exists. Bard has amended his  
23 complaint and I will consider the statute of limitations arguments if they are raised in the future.

24 **II. SURO AND KLEIN’S MOTION TO DISMISS**

25 On June 13, Bard voluntarily dismissed with prejudice all claims against defendants SuRo



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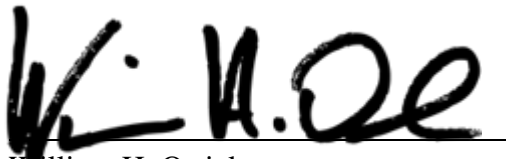
and Klein. Notice, [Dkt. No. 45]. This dismissal renders moot the Motion to Dismiss filed by SuRo and Klein. Accordingly, SuRo and Klein’s motion to dismiss is **DENIED** as moot.

**CONCLUSION**

For the foregoing reasons, I **GRANT** GSVAM and Moe’s motions to dismiss without prejudice and **DENY** Suro and Klein’s motion to dismiss as moot.

**IT IS SO ORDERED.**

Dated: June 29, 2023



William H. Orrick  
United States District Judge