

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

YU-SZE YEN, et al.,)	Case No. C-08-03535 RMW
)	
Plaintiffs,)	ORDER GRANTING MOTION FOR
)	SUMMARY JUDGMENT AGAINST
v.)	PLAINTIFF KWEI CHOONG’S FOURTH
)	AMENDED COMPLAINT
RONALD BUCHHOLZ, et al.,)	
)	
Defendants.)	[Re Docket No. 202]
)	

Pursuant to Federal Rule of Civil Procedure 56, defendants William Buchholz (“Pastor Buchholz”) and Family Community Church (“FCC”) (collectively “defendants”) move for summary judgment on the three claims asserted against them by plaintiff Kwei “Kelli” Choong’s in plaintiffs’ Fourth Amended Complaint (Breach of Fiduciary Duty, Misrepresentation and Concealment, and Constructive Fraud). On July 20, 2012, the court held a hearing on defendants’ motion. Having considered the papers submitted by the parties and the arguments of counsel, and for the reasons set forth below, the court grants defendants’ motion for summary judgment as to the claims by Choong.

I. BACKGROUND

This case concerns several real estate-related investment opportunities in which plaintiffs claim they were fraudulently induced to invest. As relevant to the present motion, plaintiff Kwei “Kelli” Choong (“plaintiff” or “Choong”) claims that she was induced by Pastor Buchholz to invest with his children, Ron and Charice, to her detriment. Although Choong in her opposition has

1 introduced evidence of facts bearing on the alleged inducement of other investors, the court limits its
2 summary and analysis to the facts relevant to Choong’s claims against Pastor Buchholz and FCC.

3 Choong first met Pastor Buchholz when she began attending FCC in 2001. Dkt. No. 203-5
4 (Dep. of Kwei “Kelli” Choong (“Choong Dep.”)) at 8:19-21. Choong’s involvement with FCC was
5 mainly limited to attending sermons, with the exception of her additional participation in the singles
6 ministry. *Id.* at 8:22-9:8. In connection with her singles ministry work, Choong had numerous
7 conversations with Pastor Buchholz. *Id.* at 9:9-15.

8 Beginning in January 2003, Pastor Buchholz delivered a four-part sermon series on Tithing
9 and Christian Stewardship, called “Dollars and Sense.” Dkt. No. 202-2 (Affid. of William E.
10 Buchholz (“Buchholz Affid.”)) ¶ 17; Dkt. No. 202-5. Following this sermon series, Pastor Buchholz
11 invited parishioners to attend a variety of educational workshops about estate planning, investment,
12 and retirement planning that were designed and led by outside professionals. Buchholz Affid. ¶ 18.
13 Flyers for one of the workshops, signed “Pastor Bill,” stated: “While there is no guarantee that
14 anyone can make on being able to achieve a 10% consistent return, it is important to bring education
15 to our people in practical areas of stewardship that have the potential to realize substantial
16 investment growth. Equity Enterprises has a strong record of helping people invest wisely so we felt
17 it would be a service to our membership to bring this seminar to our campus for convenience’ sake.”
18 *Id.* Choong, however, does not claim to have read the flyer, or attended any of the workshops that
19 followed the “Dollars and Sense” sermon series.

20 Beginning in December 2003 and continuing through May 2004, Pastor Buchholz engaged in
21 limited email correspondence with Steve Pruitt, the pastor of Gateway Church, about investing with
22 Solomon Capital, a company affiliated with Ron and Charice. Dkt. No. 203-4, Ex. 52. Pastor
23 Buchholz testified that Pastor Pruitt initiated the conversation: “[He] had asked me about my son and
24 about possible ways to be able to get connected to him. We were at a luncheon meeting, at a
25 ministers meeting, and he came up and asked me about it.” Dkt. No. 203-3 (Dep. of William E.
26 Buchholz (“Buchholz Dep.”)) at 67:9-15. On May 25, 2004, following several previous emails,
27 Pastor Pruitt indicated that he had heard some troubling “rumors” about Solomon Capital:

28 One question—when I discussed this with my Board after I had lunch with Ron, one

1 of the guys said that he had “heard” that people at FCC had mortgaged their houses to
2 invest and had never gotten their money back. I know, that usually in these “rumors”
there is a lot more to it, or wires are crossed and may not be applicable to what Ron
does at all. But I wanted to give Ron a “head’s up” so he will not be blindsided.

3 Dkt. No. 203-4, Ex. 52. Pastor Buchholz did not respond to Pastor Pruitt’s email, later explaining
4 that “[t]here was no response for me to have to it. I didn’t know what he was talking about and I had
5 not heard that . . . I never heard anything more about it.” Buchholz Dep. at 70:5-13.

6 In 2005, plaintiff approached Pastor Buchholz to ask for a realtor recommendation. Choong
7 Dep. at 11:16-12:4. Pastor Buchholz suggested that plaintiff speak with his son, Ron, or daughter,
8 Charice, given their involvement in the real estate business. *Id.* at 12:5-16. Following this
9 conversation, over the course of approximately a two-week period, Pastor Buchholz and plaintiff
10 exchanged a number of emails on the subject: On July 28, 2005, plaintiff thanked Pastor Buchholz
11 for taking the time to talk with her, and indicated that she wanted to peruse Ron and Charice’s
12 company website before looking at a prospectus. Dkt. No. 203-4, Ex. 59.

13 The next day, in an email to Anna Keirstead of Solomon Capital, Inc., Pastor Buchholz
14 requested the Luxury Development prospectus for “another potential investor for you that is a single
15 gal at our church with some \$\$\$ to invest.” *Id.* Keirstead advised that the company could not
16 provide a prospectus until the potential investor completed an Investor Information Form. *Id.*
17 Subsequent to this exchange, Pastor Buchholz emailed plaintiff a copy of the Investor Information
18 Form, with instructions that she must fill it out and mail it to Solomon Capital to determine her
19 eligibility to invest. *Id.* In the same email, Pastor Buchholz stated: “FYI, Melody and I have
20 invested in several of these Solomon Capital projects and so have other churches with great
21 satisfaction.” *Id.* On Saturday, July 30, 2005, Pastor Buchholz sent an additional email to plaintiff,
22 in which he said, “This is probably your best way to go to get long term gain Melody and I have
23 had several projects we have invested in and done very well. So have at least 20 other individuals at
24 FCC + 3 churches in Silicon Valley. The 3 churches have invested over \$700,000 in Ron’s projects
25 and when their projects were completed and profits paid they reinvested the entire amounts again.”
26 *Id.* Pastor Buchholz explained that he described real estate investment to plaintiff as the “best way
27 to go to get long term gain” because, during their initial conversation, plaintiff had indicated that
28 “she would really prefer to get into something where she didn’t have to have hands on.” Buchholz

1 Dep. at 93:12-21. Pastor Buchholz did not share with plaintiff the “rumors” that Pastor Pruitt related
2 to him in May 2004. *See id.* at 70:16-71:6 (“I don’t remember doing anything because he called
3 them rumors. And I’ve heard a lot of rumors in my day and, if I responded to all the rumors, I’d
4 never get anything done.”); Dkt. No. 203-1 (“Choong Decl.”) ¶¶ 14-17.

5 Following the July 30 exchange, there was a lapse in plaintiff and Pastor Buchholz’s
6 correspondence, until plaintiff sent an email on Thursday, August 11. Dkt. No. 203-4, Ex. 59. In
7 this email, plaintiff thanked Pastor Buchholz for the referral to Ron and Charice, and then inquired
8 about whether or not Solomon Capital makes any exceptions to the requirement that an investor have
9 at least one million dollars in net worth. *Id.* Pastor Buchholz responded later that afternoon with a
10 simple question: “How much are you trying to invest?” *Id.* Plaintiff replied (also on August 11) that
11 she intended to invest approximately fifty thousand dollars. *Id.* Following these emails, there is no
12 evidence of additional communication between plaintiff and Pastor Buchholz regarding plaintiff’s
13 decision to invest in Solomon Capital. Pastor Buchholz declares that he never gave any investment
14 materials to Choong and did not learn that she had invested until the initiation of this lawsuit. Dkt.
15 No. 207 (Buchholz decl. ¶ 11).

16 Some of Pastor Buchholz’s investments with Ron and Charice were lost, including
17 approximately \$342,000 he invested in Solomon Towers. Dkt. No. 203-3 (Buchholz Dep.) at 98:2-
18 99:7; Dkt. No. 207-1, Ex. G (chart showing Pastor Buchholz’s investments and when, or if, they paid
19 out). However, Pastor Buchholz asserts he did not lose money in Solomon Towers until mid-2007,
20 long after he had communicated with Choong about investing. Dkt. No. 207 at 17 ¶ 7. Mark
21 Putney, formerly a consultant for Solomon Capital, testified that he learned after leaving FCC in fall
22 2006 that “the money invested was lost, at specific projects,” although he could not identify which
23 projects. Dkt. No. 203-6 (Dep. of Mark Putney) at 123:10-124:21. There is no evidence that Pastor
24 Buchholz informed Choong of his losses, but there is no evidence that he had suffered any loss at the
25 time of his communications with Choong.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II. ANALYSIS

A. Claims for Breach of Fiduciary Duty and Constructive Fraud

Plaintiff’s claims for breach of fiduciary duty and constructive fraud both require a showing that defendants owed and breached a fiduciary duty to plaintiff. *Pellegrini v. Weiss*, 165 Cal. App. 4th 515, 524 (2008) (“The elements of a cause of action for breach of fiduciary duty are: 1) the existence of a fiduciary duty; 2) a breach of the fiduciary duty; and 3) resulting damage.”); *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365, 373 (1975) (“‘Constructive fraud’ arises from a breach of duty by one in a confidential or fiduciary relationship to another which induces a justifiable reliance by the latter to his prejudice.”).

Defendants argue that plaintiff cannot establish that they owed her a fiduciary duty because there is no evidence of her vulnerability to Pastor Buchholz. Both sides focus their discussion on *Richelle L. v. Roman Catholic Archbishop of San Francisco*, 106 Cal. App. 4th 257 (2003), which concerned a tort action against a priest for sexual misconduct. The court’s analysis in *Richelle L.* began with a general discussion of fiduciary and confidential relationships. The court first noted that “‘fiduciary’ and ‘confidential’ have been used synonymously to describe any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party.” *Id.* at 270 (citations omitted). The court went on to note, however, that there are “significant differences” between the two kinds of relationships. *Id.* at 271. “[F]iduciary relationships arise out of certain canonical relationships that are legally defined and regulated,” including guardian and ward, trustee and beneficiary, principal and agent, attorney and client, and conservator and conservatee. *Id.* at 270-72. In contrast, “confidential relationships do not fall into well-defined categories of law and depend heavily on the circumstances” and “may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship.” *Id.*

Focusing on confidential relationships, the court identified the “essential elements” as follows: “1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself.” *Id.* at 272 (quoting

1 *Langford v. Roman Catholic Diocese of Brooklyn*, 677 N.Y.S.2d 436, 438 (1988)). The court further
2 found that “[t]he vulnerability that is the necessary predicate of a confidential relation, and which the
3 law treats as ‘absolutely essential’ [citation] usually arises from advanced age, youth, lack of
4 education, weakness of mind, grief, sickness, or some other incapacity.” *Id.* at 273.

5 Next, the court in *Richelle L.* discussed the First Amendment implications of imposing tort
6 liability on members of the clergy for breach of fiduciary duty to a parishioner. The court ultimately
7 concluded that such a claim was possible

8 *provided* the alleged injurious conduct was not dictated by a sincerely held religious
9 belief or carried out in accordance with established beliefs and practices of the
10 religion to which the pastor belongs, and there is no other reason the issues cannot be
11 framed for the trier of fact in secular rather than sectarian terms.

12 *Id.* at 279.

13 Notwithstanding its finding that tort liability could be imposed in certain situations, the court
14 concluded that the plaintiff in *Richelle L.* had failed to plead her claim in two respects. First, she
15 failed to allege that “[the priest’s] exploitation of her alleged vulnerability arose in the context of a
16 counseling relationship.” *Id.* at 280. The court noted that the cases imposing a fiduciary duty on a
17 pastor “all involved situations in which the pastor was providing the parishioner marital, family or
18 financial counseling.” *Id.* at 280 & n.14. Second, instead of alleging any of the conventional
19 reasons for vulnerability, the plaintiff relied only on her piety. *Id.* at 280. For example, the plaintiff
20 claimed that she was “deeply religious” and her ability to resist the priest’s advances was
21 “substantially compromised by her religious faith and trust.” *Id.* The court found that this rendered
22 the claim constitutionally impermissible, as “[a]ppellant’s claim that the depth of her religious faith
23 rendered her vulnerable to [the priest] could not be adjudicated without reference to the nature of her
24 religious beliefs and the doctrines of her church.” *Id.* at 281-82.

25 Plaintiff acknowledges that a pastor-parishioner relationship alone is insufficient to establish
26 a fiduciary duty but disputes that vulnerability is necessary. Plaintiff argues that a fiduciary duty is
27 established by a pastor-parishioner relationship plus vulnerability “or something else,” namely the
28 pastor taking on another role outside of the ecclesiastical relationship. Plaintiff apparently relies on
the portion of *Richelle L.* that required the plaintiff to allege a counseling relationship; plaintiff cites

1 no other California authority to support her contention that this additional counseling role is
2 sufficient to establish a fiduciary duty.

3 *Richelle L.* is abundantly clear that *both* a counseling relationship *and* vulnerability are
4 required. First, in stating the applicable standards, *Richelle L.* twice refers to vulnerability as
5 “essential” and calls it “the necessary predicate of a confidential relation.” 106 Cal. App. 4th at 272-
6 73. Moreover, after finding that the plaintiff failed to allege a counseling relationship, the court
7 noted that it might have allowed the plaintiff an opportunity to amend the complaint except there
8 was a further deficiency: the plaintiff’s reliance on her piety to show that she was vulnerable. *Id.* at
9 280-81. The court found the plaintiff could not amend to avoid this second problem: “omitting the
10 assertion that her religiosity rendered her vulnerable to [the priest] . . . would defeat her assertion
11 that they stood in a confidential relation” and she could not “replace the constitutionally
12 impermissible vulnerability with a different disability” because she could not disavow her previous
13 allegations. *Id.* at 282. Thus, the *Richelle L.* plaintiff’s claim was dismissed without leave to amend
14 because of her inability to allege vulnerability, notwithstanding the possibility that she could have
15 amended to allege a counseling relationship. Similarly here, plaintiff’s claim fails because she does
16 not assert any basis for finding that she was vulnerable to Pastor Buchholz. Thus, summary
17 judgment is granted on plaintiff’s claims for breach of fiduciary duty and constructive fraud.

18 **B. Claim for Misrepresentation and Concealment**

19 **i. Misrepresentation**

20 The elements of a claim for misrepresentation are: (1) misrepresentation of material fact; (2)
21 no reasonable ground for believing the truth of the representation; (3) intent that the plaintiff rely on
22 the representation; (4) plaintiff’s justifiable reliance; and (5) causation and damages. *Home Budget*
23 *Loans, Inc. v. Jacoby & Meyers Law Offices*, 207 Cal. App. 2d 1277, 1285 (1989).

24 Defendants argue that there was no misrepresentation on which plaintiff could have
25 justifiably relied. Plaintiff responds, *inter alia*, that “[m]isrepresentation of material facts is
26 established by [Pastor Buchholz’s] overselling opportunities with his children, his returns, and
27 returns of others.” Dkt. No. 203 at 21. However, plaintiff must demonstrate that such “overselling”
28 meets the requirements of an actionable misrepresentation, including that it is a representation of

1 past or existing fact, not a representation of opinion. *See* 5 Witkin, *Summary of California Law*,
2 Torts § 774, p. 1123 (10th ed. 2005) (“Representations of opinion are ordinarily not actionable. . . .
3 Moreover, the representation must ordinarily be about past or existing facts; predictions about future
4 events, or statements about future action by some third party, are deemed opinions, and not
5 actionable fraud.”). While plaintiff’s briefing exhaustively recounts various communications
6 involving Pastor Buchholz, her papers do not specifically identify what statements Pastor Buchholz
7 made to Choong that she contends were false when made. At the hearing, plaintiff’s counsel relied
8 on the statements in Pastor Buchholz’s July 29-30, 2005 correspondence. Thus, the court examines
9 whether plaintiff has adduced sufficient evidence for one to infer that those statements were false
10 when made.

11 In his July 29 email, Pastor Buchholz wrote to Choong: “Melody and I have invested in
12 several of these Solomon Capital projects and so have other churches with great satisfaction.” Dkt.
13 No. 203-4, Ex. 59. In his July 30 email, Pastor Buchholz similarly wrote: “This is probably your
14 best way to go to get long term gain. . . . [¶] Melody and I have had several projects we have
15 invested in and done very well. So have at least 20 other individuals at FCC + 3 churches in Silicon
16 Valley. The 3 churches have invested over \$700,000 in Ron’s projects and when their projects were
17 completed and profits paid they reinvested the entire amounts again.” *Id.*

18 At the hearing, plaintiff’s counsel argued that Pastor Buchholz falsely referred to “several”
19 projects when, as of the end of July 2005, he had received only a single payout, *see* Dkt. No. 207-1,
20 Ex. G. The same evidence shows that Pastor Buchholz had already invested in at least nine projects
21 at the time of his emails to Choong, so he was apparently truthful in stating he had invested in
22 “several” projects. Although the meaning of his statement that he and Melody “have had several
23 projects we have invested in and done very well” is not entirely clear, a reasonable interpretation is
24 that Pastor Buchholz’s statements referred to the projects in the aggregate. The payout they had
25 received at the time had been very favorable. If the statement was intended to mean that each of the
26 projects had been successful, the statement may have been false, but the evidence is not clear as to
27 what Pastor Buchholz knew about each project at the time. Even if Pastor Buchholz may have
28 misrepresented the number of his then-successful investments, however, there is no evidence that the

1 misrepresentation was material. Plaintiff asserts that the factors significant to her decision to invest
2 were that everything Pastor Buchholz said and did came across as a recommendation; Pastor
3 Buchholz never indicated that there were any problems with his or others' investments or that
4 investing with Ron and Charice would be anything but safe and profitable; and her faith and trust in
5 Pastor Buchholz. Dkt. No. 203 at 20-21; *see* Choong Decl. ¶¶ 10, 14-19. None of these factors
6 would change if Pastor Buchholz had instead told Choong that he had done very well in one project
7 and had invested in several other projects that had yet to pay out. Such a statement, with the rest of
8 the email, would still convey that Pastor Buchholz and others had repeatedly invested with Ron and
9 Charice, and that both Pastor Buchholz and others had had good results. Notably, there is no
10 evidence that the lack of a payout by July 2005 indicated that any other project was going poorly.
11 Thus, an accurate statement about the status of Pastor Buchholz's investments would not have
12 changed the general impression of optimism and satisfaction he conveyed.

13 Plaintiff does suggest in her papers that Pastor Buchholz's statements were also false because
14 he lost approximately \$342,000 in the Solomon Towers project. However, there is no evidence that,
15 in June 2005, this loss had already occurred or Pastor Buchholz could reasonably have foreseen the
16 loss. The evidence indicates that Pastor Buchholz had first invested in Solomon Towers on February
17 28, 2005, just months before he told Choong about his investments. Dkt. No. 207-1, Ex. G. Pastor
18 Buchholz's testimony—the only evidence as to timing—is that the loss did not occur until mid-2007.
19 Dkt. No. 207 at 17 ¶ 7. Thus, there is no evidence that Pastor Buchholz was aware of any cause for
20 dissatisfaction at the time he made his statements to Choong in June 2005.

21 Because plaintiff has not identified a false statement of material fact, the court grants
22 summary judgment on plaintiff's claim for misrepresentation. Even if Pastor Buchholz withheld
23 information that might have undermined the positive impression he conveyed, such nondisclosure
24 more properly supports a concealment claim, not a misrepresentation claim. Thus, the court now
25 turns to plaintiff's claim for concealment.

26 **ii. Concealment**

27 The elements of a concealment claim are: (1) the defendant must have concealed or
28 suppressed a material fact; (2) the defendant must have been under a duty to disclose the fact to the

1 plaintiff; (3) the defendant must have intentionally concealed or suppressed the fact with the intent to
2 defraud the plaintiff; (4) the plaintiff must have been unaware of the fact and would not have acted
3 as he did if he had known of the concealed or suppressed fact; and (5) as a result of the concealment
4 or suppression of the fact, the plaintiff must have sustained damage. *Lovejoy v. AT&T Corp.*, 92
5 Cal. App. 4th 85, 95 (2001).

6 Plaintiff claims that Pastor Buchholz failed to disclose the rumor he heard from Pastor Pruitt
7 in May 2004 regarding other FCC members losing money on their investments with Solomon
8 Capital. As discussed above, plaintiff also suggests that Pastor Buchholz concealed the fact that
9 some of his investments lost money. Plaintiff claims that “once he began talking, [Pastor Buchholz]
10 had a duty to talk about everything.” Dkt. No. 203 at 22:4-5. However, plaintiff does not explain
11 what circumstances gave rise to Pastor Buchholz’s duty to disclose, and fails to cite any authority
12 that would support the finding of such a duty.

13 California courts have identified four instances in which nondisclosure or concealment may
14 be actionable as fraud: “(1) when the defendant is in a fiduciary relationship with the plaintiff;
15 (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff;
16 (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the
17 defendant makes partial representation but also suppresses some material facts.” *Wilkins v. Nat’l*
18 *Broad. Co., Inc.*, 71 Cal. App. 4th 1066, 1082 (1999) (quoting *LiMandri v. Judkins*, 52 Cal. App. 4th
19 326, 336-37 (1997)). “Putting aside a fiduciary relationship, each of the other three circumstances in
20 which nondisclosure may be actionable *presupposes the existence of some other relationship*
21 *between the plaintiff and defendant in which a duty to disclose can arise . . . [S]uch a relationship*
22 *can only come into being as a result of some sort of transaction between the parties.” Id.* (internal
23 quotations omitted and emphasis added).

24 As discussed above, there was no fiduciary relationship between plaintiff and Pastor
25 Buchholz. Thus, in order for Pastor Buchholz to have a duty to disclose, such that his failure to
26 divulge the contents of the May 2004 email constituted concealment, he must have been engaged in
27 “some sort of transaction” with plaintiff. Circumstances giving rise to a “transaction” include: “the
28 relationship between seller and buyer, employer and prospective employee, doctor and patient, or

1 parties entering into any kind of contractual agreement.” *LiMandri*, 52 Cal. App. 4th at 337 (1997).
2 Here, there is no evidence that plaintiff entered into any kind of contractual relationship or
3 transaction with Pastor Buchholz or FCC. Plaintiff argued at the hearing that Pastor Buchholz
4 undertook the role of financial advisor to his congregation as a whole, but, even if this were true,
5 there is no evidence that plaintiff was exposed to any of the relevant conduct. In addition, plaintiff
6 admitted at her deposition that she did not ask Pastor Buchholz to act as her financial advisor, did
7 not have any agreement with him for him to be her financial advisor, and did not expect him to be
8 her financial advisor. Dkt. No. 203-5 (Choong Dep.) at 30:11-16. Thus, plaintiff has not established
9 that Pastor Buchholz had a duty to disclose, and the court grants summary judgment on plaintiff’s
10 claim for concealment.

11 **III. ORDER**

12 For the foregoing reasons, the court grants defendants’ motion for summary judgment on
13 plaintiff Kwei Choong’s claims against Pastor Buchholz and FCC.

14
15
16 Dated: March 20, 2013


RONALD M. WHYTE
United States District Judge