

\*\*E-Filed 11/16/10\*\*

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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
8 **SAN JOSE DIVISION**  
9

10 TMX FUNDING, INC., a Delaware corporation,  
11 Plaintiff,

12 v.

13  
14 IMPERO TECHNOLOGIES, INC., a California  
15 corporation; CLARENCE NICHOLAS  
16 STEIGELMAN, an individual; RONALD S.  
17 LESNIAK, an individual; DAVID LESNIAK, an  
18 individual; MITCHELL A. HEINLEIN, an  
19 individual; JOSEPH ZHANG, a.k.a.  
20 XIANGCHOU ZHANG, an individual;  
21 MICHELLE DOVER, an individual; and BITTEL  
22 TECHNOLOGY, INC., a California corporation;

23 Defendants.

24 \_\_\_\_\_  
25 RONALD S. LESNIAK, an individual

26 Counterclaimant,

27 v.

28 TMX FUNDING, INC., a Delaware Corporation;  
BING SUN, an individual; JOSE QUIROS, an  
individual; and JAMIE KNIEP, an individual;

Counter-defendants.

Case No. 5:10-cv-00202 JF/PVT

**ORDER<sup>1</sup> GRANTING MOTION TO  
DISMISS WITH LEAVE TO  
AMEND**

[Docket No. 185]

<sup>1</sup> This disposition is not designated for publication in the official reports.

1 Counter-Defendants TMX Funding, Inc. (“TMX”) and Bing Sun (“Sun”) (collectively,  
2 “Moving Counter-Defendants”) move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the  
3 counterclaims of Counterclaimant Ronald S. Lesniak (“R. Lesniak”). The Court has considered  
4 the moving and responding papers and the oral arguments of counsel presented at the hearing on  
5 November 5, 2010. For the reasons discussed below, the motion will be granted, with leave to  
6 amend.

## 7 I. BACKGROUND

8 Twenty-five years ago, R. Lesniak founded Teledex, LLC (“Teledex”), (Counterclaim ¶  
9 9), a company that designed and manufactured hotel guest room telecommunication solutions.  
10 The allegations are not entirely clear, but it appears that in 1999, Teledex or its parent company  
11 incurred approximately \$50 million in debt while engaging in the leveraged buyout of TT  
12 Systems, LLC (“TT Systems”). (Counterclaim ¶¶ 9, 12.) Under the terms of the loan, Teledex  
13 and TT Systems granted a security interest “in substantially all of their assets . . .” to the  
14 lenders. (Moving Counter-Defendants RJN, Ex. A, App’x 2.) As part of the buyout, it appears  
15 that some entity – it is unclear whether it was a third party or Teledex itself – also purchased  
16 some or all of Teledex’s outstanding shares. (Counterclaim ¶ 10.) R. Lesniak alleges that to  
17 secure the loan necessary to complete the buyout, he was required to “reinvest \$3 million from  
18 the proceeds he received as a shareholder of Teledex” and to consent to “an employment  
19 agreement and covenants . . .” (*Id.*) GE Capital Corporation (“GECC”) was one of the lenders  
20 involved. (Counterclaim ¶ 11.) Within two years of the buyout, TT Systems “failed to sustain  
21 its business” and “ceased operations.” (Counterclaim ¶ 12.)

22 On March 4, 2003, Teledex’s debt was “restructured and reassigned . . . through the  
23 Amended and Restated Credit Agreement (‘New Credit Facility’),” establishing GECC as  
24 “Teledex’s major lender.” (Counterclaim ¶ 13.) R. Lesniak alleges that as a result of the New  
25 Credit Facility, he “was required to agree to numerous terms,” including a non-competition  
26 agreement. (Counterclaim ¶ 13.) Among other things, the loan would be considered to be in  
27 default if R. Lesniak were to step down as chief operating officer of Teledex or if Teledex, TT  
28 Systems, or their parent company were to seek bankruptcy protection. (*Id.*; R. Lesniak’s RJN

1 Ex. A at 88-89.)

2 Teledex had difficulty servicing the debt. R. Lesniak alleges that GECC received  
3 “various offers [before 2009] from third parties to purchase [Teledex] or its assets for market  
4 value, but each offer was refused by GECC” because GECC said that it “preferred to receive  
5 regular debt service from Teledex rather than retire its debt at market value through the sale of  
6 the company.” (Counterclaim ¶ 33.) In 2009, GECC told R. Lesniak that it intended to sell  
7 Teledex’s debt, (Counterclaim ¶ 36), and it “encouraged R. Lesniak to lead a management  
8 buyout of Teledex.” (Counterclaim ¶ 32.) R. Lesniak allegedly received several term sheets and  
9 expressions of interest to purchase Teledex’s debt, and each term sheet that he received provided  
10 that the employees of Teledex “would receive the amounts due them under their agreements and  
11 pursuant to law.” (Counterclaim ¶ 37.) GECC told R. Lesniak on December 4, 2009 that it was  
12 aware of no buyers that were interested in Teledex’s debt, and it directed him to make an offer  
13 during the week of December 7, 2009 to purchase the debt himself. (Counterclaim ¶ 41.)  
14 However, at approximately the time R. Lesniak was to make his offer, GECC and TMX  
15 informed R. Lesniak that TMX had purchased the debt. (Counterclaim ¶ 42.) Teledex’s assets  
16 immediately were frozen, “forcing the termination of the Teledex workforce.” (*Id.*) TMX paid  
17 “an amount far greater than the Teledex enterprise market value, as indicated by the third party  
18 offers and valuations obtained by R. Lesniak,” because the sale “allowed TMX to become a  
19 monopoly in its market.” (Counterclaim ¶¶ 45, 46.) TMX foreclosed on Teledex’s debt and  
20 acquired Teledex’s assets as the single bidder at two separate private foreclosure sales.  
21 (Counterclaim ¶ 47.)

22 R. Lesniak alleges that since the acquisition, TMX, through certain of its officers and  
23 employees, has defamed and harassed him. He claims that Jamie Kniep (“Kniep”), TMX’s  
24 “senior financial officer,” (Counterclaim ¶ 7), knowingly communicated false statements to  
25 former Teledex employees, including statements that Teledex’s management had “decided not  
26 to ask for funds to continue normal business operations” and “that Teledex management argued  
27 against funding the payroll which was to be issued to employees on December 11, 2009,”  
28 (Counterclaim ¶ 57). R. Lesniak also alleges that Jose Quiros (“Quiros”), TMX’s chief

1 operating officer, (Counterclaim ¶ 6), knowingly communicated false statements to former  
2 Teledex employees, including a statement that the Teledex employees were terminated abruptly  
3 because of R. Lesniak’s lack of cooperation with the transition, (Counterclaim ¶ 59). He asserts  
4 that TMX, Quiros, and Sun – TMX’s chief executive officer, (Counterclaim ¶ 5) – made  
5 “knowingly false accusations of wrongful and illegal conduct [about R. Lesniak],” including  
6 allegations that R. Lesniak “fraudulently over-valu[ed] inventory” and engaged in “the theft of  
7 shipping containers [that] TMX deployed to transfer the Teledex assets . . . ,” (Counterclaim ¶  
8 61). Finally, R. Lesniak alleges that “TMX and [Teledex’s] former receiver, Burbank, continue  
9 to forward invoices arising from Teledex’s business, including income and employee tax bills,  
10 employee claims, vendor invoices and other assorted obligations, to R. Lesniak for payment.”  
11 (Counterclaim ¶ 63.)

12 On January 14, 2010, TMX filed suit against R. Lesniak and several other defendants,  
13 alleging *inter alia* that R. Lesniak was liable for the misappropriation of trade secrets and  
14 conversion of personal property. R. Lesniak has counterclaimed, alleging that TMX, Sun,  
15 Quiros, and Kniep (collectively, “Counter-Defendants”) are liable for defamation, intentional  
16 infliction of emotional distress (“IIED”), and fraud.

## 17 II. LEGAL STANDARD

18 A complaint may be dismissed for failure to state a claim upon which relief may be  
19 granted if a plaintiff fails to proffer “enough facts to state a claim to relief that is plausible on its  
20 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Allegations of material fact must  
21 be taken as true and construed in the light most favorable to the nonmoving party. *Cahill v.*  
22 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1997). Nonetheless, the Court need not  
23 accept as true allegations that are conclusory, unwarranted deductions of fact, or unreasonable  
24 inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). *See also*  
25 *Twombly*, 550 U.S. at 561 (“a wholly conclusory statement of [a] claim” will not survive a  
26 motion to dismiss). The Court’s review on a motion to dismiss is limited to the face of the  
27 complaint and matters judicially noticeable. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504  
28 (9th Cir. 1986); *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Under

1 the “incorporation by reference” doctrine, the Court also may consider documents which are  
2 referenced extensively in the complaint and which are accepted by all parties as authentic. *In re*  
3 *Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999).

4 Leave to amend should be granted unless it is clear that the complaint’s deficiencies  
5 cannot be cured by amendment. *Lucas v. Dep’t of Corr.*, 66 F. 3d 245, 248 (9th Cir. 1995). In  
6 assessing whether to grant an opportunity to amend, the Court considers “the presence or absence  
7 of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous  
8 amendments, undue prejudice to the opposing party[,] and futility of the proposed amendment.”  
9 *Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) (quoting *Moore v. Kayport*  
10 *Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989)). When amendment would be futile,  
11 dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th Cir. 1996).

12 Finally, although their claims arise under state law, R. Lesniak’s allegations are subject to  
13 the Federal Rules of Civil Procedure, and Fed. R. Civ. P. 9(b) requires that “a party must state  
14 with particularity the circumstances constituting fraud or mistake.” *See Vess v. Ciba-Geigy*  
15 *Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (if “the claim is said to be ‘grounded in  
16 fraud’ or to ‘sound in fraud,’ [then] the pleading of that claim as a whole must satisfy the  
17 particularity requirement of Rule 9(b).”); and *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir.1994)  
18 (claims based in fraud “must state precisely the time, place, and nature of the misleading  
19 statements, misrepresentations, and specific acts of fraud.”).

### 20 III. DISCUSSION

21 Moving Counter-Defendants seek to dismiss all of R. Lesniak’s claims with respect to  
22 Sun and his claims for IIED and fraud with respect to TMX.

#### 23 A. Documents considered by the Court

24 As discussed above, on a motion to dismiss, the Court may consider documents that are  
25 referenced extensively in the complaint and which are accepted by all parties as authentic. *In re*  
26 *Silicon Graphics*, 183 F.3d at 986. Moving Counter-Defendants request judicial notice of TMX’s  
27 complaint filed in the instant action. Attached to that pleading are several loan documents –  
28 including excerpts of what appears to be the New Credit Facility, (Moving Counter-Defendants’

1 RJN, Ex. A, App'x 1) and a document entitled "Parent Guaranty" signed by R. Lesniak, (*id.*, Ex.  
2 A, App'x 2) – that are referenced extensively in the counterclaims. Accordingly, the Court will  
3 take judicial notice of these documents. R. Lesniak also requests judicial notice of a complete  
4 version of the New Credit Facility. (R. Lesniak's RJN, Ex. A.) The copy of the New Credit  
5 Facility provided by Moving Counter-Defendants is dated March 6, 2003. From the excerpts  
6 provided, it is clear that this version differs from the copy of the New Credit Facility provided by  
7 R. Lesniak, which is dated March 4, 2003. In his counterclaim, R. Lesniak alleges that the New  
8 Credit Facility is dated March 4, 2003. (Counterclaim ¶ 13.) However, the copy he provides is  
9 unsigned, while the copy provided by Moving Counter-Defendants is signed. For purposes of the  
10 instant motion, the Court will refer to the copy of the New Credit Facility provided by R. Lesniak  
11 because the Court must accept his allegations as true. The instant motion can be resolved without  
12 reference to the other documents of which Moving Counter-Defendants request judicial notice,  
13 and the Court will deny the remainder of their request as moot.

14 **B. Whether Sun is liable for TMX's alleged tortious conduct**

15 R. Lesniak points out that "[a] corporate officer or director is, in general, personally liable  
16 for all torts which he authorizes or directs or in which he participates, notwithstanding that he  
17 acted as an agent of the corporation and not on his own behalf." *Coastal Abstract Serv., Inc. v.*  
18 *First Am. Title Ins. Co.*, 173 F.3d 725, 734 (9th Cir. 1999). However, "[an] officer or director  
19 will not be liable for torts in which he does not personally participate, of which he has no  
20 knowledge, or to which he has not consented. . . . While the corporation itself may be liable for  
21 such acts, the individual officer or director will be immune unless he authorizes, directs, or in  
22 some meaningful sense actively participates in the wrongful conduct." *Frances T. v. Vill. Green*  
23 *Owners Ass'n.*, 42 Cal. 3d 490, 504 (1986) ( quoting *Teledyne Indus., Inc. v. Eon Corp.*, 401 F.  
24 Supp. 729, 736-37 (S.D.N.Y. 1975) (applying California law)). Accordingly, to support a  
25 reasonable inference of his allegations against Sun, discussed below, R. Lesniak must plead facts  
26 that satisfy the standard articulated in *Frances T.*

27 **C. Defamation (Counterclaim Count 1)**

28 Defamation is "the intentional publication of a statement of fact that is false, unprivileged,

1 and has a natural tendency to injure or which causes special damage.” *Smith v. Maldonado*, 72  
2 Cal. App. 4th 637, 645 (1999) (citations omitted). “Publication means communication to some  
3 third person who understands the defamatory meaning of the statement and its application to the  
4 person to whom reference is made.” *Id.* With respect to Sun, R. Lesniak alleges only that Sun  
5 “maliciously defamed [him] through knowingly false accusations of wrongful and illegal  
6 conduct,” including “fraudulently over-valuing inventory” and “the theft of shipping containers  
7 [that] TMX deployed to transfer the Teledex assets that were under TMX’s control . . . .”  
8 (Counterclaim ¶ 61.) However, R. Lesniak does not allege facts that could support a reasonable  
9 inference that the statements were untrue, were “published” to a third person, or were  
10 unprivileged, *e.g.*, that the statements were made outside of the context of a judicial proceeding,  
11 Cal. Civ. Code § 47(b). While he alleges that other TMX officers made defamatory statements  
12 that were published to former TMX employees, R. Lesniak does not allege facts that would  
13 support a reasonable inference that Sun “authorize[d], direct[ed], or in some meaningful sense  
14 actively participate[d]” in that conduct. *See Frances T.*, 42 Cal. 3d at 504. Accordingly, count  
15 one of the counterclaims will be dismissed with respect to Sun. Because the defects conceivably  
16 could be cured by amendment, leave to amend will be granted.

17 **D. IIED (Counterclaim Count 2)**

18 “The elements of a prima facie case for the tort of intentional infliction of emotional  
19 distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing,  
20 or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering  
21 severe or extreme emotional distress; (3) and actual and proximate causation of the emotional  
22 distress by the defendant’s outrageous conduct.” *Cervantez v. J. C. Penney Co.*, 24 Cal. 3d 579,  
23 593 (1979) (citations omitted). R. Lesniak asserts that Counter-Defendants are liable for IIED  
24 because they have “hidden, concealed, manipulated and/or stolen substantial Teledex assets,”  
25 “engaged in a campaign of disparagement of R. Lesniak,” and “engaged in a secret transaction for  
26 the purpose of creating a monopoly in the third party hospitality telephony market,”  
27 (Counterclaim ¶¶ 74-76), causing R. Lesniak to lose his job and to suffer emotional and physical  
28 distress.

1 Moving Counter-Defendants contend that R. Lesniak’s allegations “fail to state sufficient  
2 facts to show that the alleged conduct was directed at [R. Lesniak] personally with the intent of  
3 causing him emotional distress.” (Counter-Defs.’ Mot. at 11:25-27 (emphasis in the original).)  
4 *See Hong Soo Shin v. Oyoung Kong*, 80 Cal. App. 4th 498, 512 (Cal. App. 1st Dist. 2000)  
5 (quoting *Smith v. Pust*, 19 Cal. App. 4th 263, 274 (Cal. App. 4th Dist. 1993)) (noting that  
6 California law requires that a defamatory act be “directed at the plaintiff” or performed “in the  
7 presence of the plaintiff.”). They assert that their alleged actions were directed only toward  
8 Teledex as a corporation. However, R. Lesniak alleges sufficient facts to support an inference  
9 that the actions alleged were performed at least in part with the intent to oust him from a position  
10 of control over Teledex’s assets and that he was affected directly by several of the actions alleged.

11 Nonetheless, R. Lesniak’s allegations are insufficient to support an inference that the  
12 alleged conduct satisfied all of the elements of a prima facie case for IIED. No facts to support  
13 the legal conclusion that R. Lesniak has suffered “*severe or extreme* emotional distress.”  
14 *Cervantez*, 24 Cal. 3d at 593. R. Lesniak does claim that Counter-Defendants’ actions have  
15 caused him to suffer “humiliation, mental anguish, and emotional and physical distress, and [that  
16 he] has been injured in mind and body,” (Counterclaim ¶ 78), but Court need not accept such  
17 conclusory allegations of the elements of a tort. *Sprewell*, 266 F.3d at 988.

18 R. Lesniak alleges that TMX’s actions caused him to lose his job, which obviously is a  
19 distressing event. However, the loss of one’s job does not automatically give rise to a claim for  
20 IIED. R. Lesniak alleges that TMX and Sun disparaged him, causing injury to his professional  
21 reputation and preventing him from obtaining other employment. However, the counterclaims as  
22 presently framed do not spell out the emotional-effects of this alleged conduct. R. Lesniak also  
23 alleges in his opposition papers that TMX and Sun “have informed the former Teledex vendors  
24 that they should harass R. Lesniak for any amounts owed by him to them.” (R. Lesniak’s Opp’n  
25 at 10:7-8.) While his opposition papers refer to paragraph 61 of the counterclaims for support of  
26 that allegation, paragraph 61 in fact alleges that “TMX and [Teledex’s] former receiver, Burbank,  
27 continue to forward invoices arising from Teledex’s business . . . to R. Lesniak for payment.”  
28 (Counterclaim ¶ 68.) R. Lesniak does not allege how many invoices he has received or that the



1 vendors in fact have engaged in harassing conduct at the direction of TMX or Sun. Without such  
2 detail, the conduct alleged in the complaint is insufficient to support an inference of “severe” or  
3 “extreme” emotional distress. Because these defects conceivably could be cured by amendment,  
4 leave to amend will be granted.

5 **E. Fraud (Counterclaim Count 3)**

6 The elements of actionable fraud consist of “(1) misrepresentation (false representation,  
7 concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to induce reliance;  
8 (4) justifiable reliance; and (5) resulting damages.” *Okun v. Morton*, 203 Cal. App. 3d 805, 828  
9 (Cal. App. 2d Dist. 1988) (citations omitted). R. Lesniak contends that GECC made fraudulent  
10 misrepresentations to him and intentionally concealed facts from him. He alleges that Counter-  
11 Defendants are liable for GECC’s fraudulent actions because they “colluded” with GECC.  
12 Moving Counter-Defendants contend that they cannot be liable for concealment because R.  
13 Lesniak’s allegations are insufficiently particular to support a reasonable inference that GECC or  
14 Counter-Defendants owed him fiduciary duties. They also contend R. Lesniak’s allegations with  
15 respect to fraud and deceit are insufficiently particular to support an inference that Counter-  
16 Defendants colluded with GECC to perpetrate the fraud, either through misrepresentations or  
17 concealments. Finally, Moving Counter-Defendants assert that the fraud claim is time-barred.

18 **1. Whether GECC had a fiduciary duty to R. Lesniak**

19 R. Lesniak contends that GECC is liable for concealment because it owed him a fiduciary  
20 duty.<sup>2</sup> Moving Counter-Defendants point out that the loan was between GECC and Teledex, not  
21 between GECC and R. Lesniak personally. Relatedly, they note that:

22 It has long been regarded as “axiomatic that the relationship between a bank and  
23 its depositor arising out of a general deposit is that of a debtor and creditor.”

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24 <sup>2</sup> ““There are ‘four circumstances in which nondisclosure or concealment may constitute  
25 actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when  
26 the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the  
27 defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes  
28 partial representations but also suppresses some material facts.’” *OCM Principal Opportunities  
Fund, L.P. v. CIBC World Mkts. Corp.*, 157 Cal. App. 4th 835, 859 (Cal. App. 2d Dist. 2007)  
(quoting *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (Cal. App. 4th Dist. 1997)).

1 [Citation.] “A debt is not a trust and there is not a fiduciary relation between  
2 debtor and creditor as such.” [Citation.] The same principle should apply with  
even greater clarity to the relationship between a bank and its loan customers.

3 *Price v. Wells Fargo Bank*, 213 Cal. App. 3d 465, 476 (Cal. App. 1st Dist. 1989) (citations  
4 omitted). R. Lesniak nonetheless contends that GECC acted differently than a typical lender  
5 because the terms of the loan specifically “imposed requirements on him personally.” (R.  
6 Lesniak’s Opp’n at 6:24.) He alleges that the original loan in 1999 obligated him to reinvest \$3  
7 million in Teledex “as a requirement of continued employment by Teledex,” (Counterclaim ¶ 10),  
8 and that the New Credit Facility required him to consent to a non-competition agreement<sup>3</sup> and  
9 agree not to “transfer or sell any of his Teledex Stock.” (Counterclaim ¶ 13(b), (d).)<sup>4</sup> R. Lesniak  
10 contends that GECC’s “severe restrictions . . . placed him in a position of vulnerability to GECC”  
11 and that “GECC knowingly undertook to act on his behalf.”

12 “[B]efore a person can be charged with a fiduciary obligation, he must either knowingly  
13 undertake to act on behalf and for the benefit of another, or must enter into a relationship which  
14 imposes that undertaking as a matter of law.” *City of Hope Nat’l Med. Ctr. v. Genentech, Inc.*,  
15 43 Cal. 4th 375, 386 (2008) (quoting *Comm. on Children’s Television, Inc. v. Gen. Foods Corp.*,  
16 35 Cal. 3d 197, 221 (Cal. 1983), *superseded by statute on other grounds as recognized in Gartin*  
17 *v. S&M NuTec LLC*, 245 F.R.D. 429, 437 (C.D. Cal. 2007)) (alterations in the original).

18 “[V]ulnerability ‘is the necessary predicate of a confidential relation,’ and ‘the law treats [it] as  
19 ‘absolutely essential’” *Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1161 (Cal.  
20 App. 2d Dist. 2005) (quoting *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App. 4th 257,  
21 273 (Cal. App. 1st Dist. 2003)). That vulnerability “usually arises from advanced age, youth, lack  
22

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23 <sup>3</sup> The non-competition agreement required “that he not work for anyone in the business  
24 of ‘distributing telephony-based terminal equipment throughout the world,’ should his  
25 employment at Teledex end.” (Counterclaim ¶ 13(d).)

26 <sup>4</sup> R. Lesniak also alleges that the New Credit Facility “required” him to “remain in his  
27 position as the Teledex CEO,” and “that he not seek bankruptcy protection for Teledex.”  
(Counterclaim ¶ 13(a), (c).) However, the New Credit Facility does not prevent Lesniak from  
28 taking action to the contrary, but rather provides that GECC would consider the loan to be in  
default if such action occurred. (R. Lesniak’s RJN, Ex. A at 87-89.)

1 of education, weakness of mind, grief, sickness, or some other incapacity.” *Richelle*, 106 Cal.  
2 App. 4th at 273. *Richelle* describes conditions that preexist the transaction at issue. Here, R.  
3 Lesniak’s alleged “vulnerability” arose from the after-effects of the transaction: a \$50 million  
4 loan that Teledex incurred to engage in the leveraged buyout of TT Systems, that was a  
5 transaction intended “to provide liquidity to [Teledex’s] early investor and Teledex  
6 shareholders,” and that was undertaken because Teledex’s investors “desired to combine Teledex  
7 and TT Systems together and take the combined entities public.” (Counterclaim ¶ 10.) R.  
8 Lesniak’s allegations do not support an inference that he entered the loan transaction  
9 involuntarily or under some type of duress as a result of a preexisting vulnerability of which  
10 GECC took advantage. Because commercial loan transactions between a bank and a lender  
11 typically do not result in the creation of fiduciary duties, *Price*, 213 Cal. App. 3d at 476, the  
12 allegations in the counterclaim do not support a contention that GECC “had undertaken a  
13 fiduciary obligation ‘to act on behalf of and for the benefit of another.’” *City of Hope*, 43 Cal. 4th  
14 at 386 (2008) (quoting *Children’s Television*, 35 Cal. 3d at 221 (1983)).

15 **2. Whether R. Lesniak has alleged sufficiently that Counter-Defendants**  
16 **colluded with GECC**

17 Moreover, even if GECC did knowingly undertake to act on behalf and for his benefit or  
18 made affirmative misrepresentations to him, R. Lesniak has not alleged sufficiently that Counter-  
19 Defendants colluded with GECC. Because R. Lesniak does not allege that Counter-Defendants  
20 made misrepresentations directly to him or that they owed a direct fiduciary duty to him, this  
21 failure is fatal to his fraud claim.<sup>5</sup> In his opposition papers, R. Lesniak does not direct the Court  
22 to any fact that support the consulsory allegation that Counter-Defendants colluded with GECC in  
23 perpetrating fraud. Instead, he directs the Court to various authorities holding that “[w]here there  
24 is a common plan or design to commit a tort, all who participate are jointly liable whether or not

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25  
26 <sup>5</sup> R. Lesniak alleges that TMX “assumed the rights and obligations of GECC[,] including  
27 the fiduciary duties GECC owed to Teledex and R. Lesniak.” (Counterclaim ¶ 22.) As discussed  
28 above, R. Lesniak has not alleged sufficiently that GECC did owe him a fiduciary duty. Nor does  
he provide a factual basis sufficient to support his bare contention that TMX did assume those  
duties if they existed.

1 they do the wrongful acts.” *Certified Grocers of Cal. v. San Gabriel Vall. Bank*, 150 Cal. App.  
2 3d 281, 289 (Cal. App. 2d Dist. 1983) (citing *Tide Water Associated Oil Co. v. Super. Ct. of Los*  
3 *Angeles Cnty*, 43 Cal. 2d 815, 827 (1955)). *See also Neilson v. Union Bank of Cal., N.A.*, 290 F.  
4 Supp. 2d 1101, 1127 (C.D. Cal. 2003) (citing *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 1325-26  
5 (Cal. App. 2d Dist. 1996) (noting that “California law . . . does not require that the aider and  
6 abettor owe plaintiff a duty so long as it knows the primary wrongdoer’s conduct constitutes a  
7 breach of duty, and it substantially assists that breach of duty.”).

8 R. Lesniak alleges that GECC refused prior offers to purchase Teledex or its assets,  
9 represented to him that it would accept a bid from Teledex’s management for the purchase of  
10 Teledex’s debt while selling the debt to TMX even before hearing whether Teledex’s  
11 management had a bid to offer, and gave TMX favorable financing for a purchase price of  
12 Teledex’s debt in “an amount far greater than the Teledex enterprise market value . . . .”  
13 (Counterclaim ¶¶ 33, 41-45.) Even if these actions were improper, R. Lesniak does not explain  
14 how Counter-Defendants were involved in GECC’s alleged scheme. *See Kaplan*, 49 F.3d at 1370  
15 (claims based in fraud “must state precisely the time, place, and nature of the misleading  
16 statements, misrepresentations, and specific acts of fraud.”). He claims that TMX paid a  
17 “premium price” for Teledex’s debt because it would allow “TMX to become a monopoly in the  
18 industry,” (Counterclaim ¶ 46), but that fact alone does not support a claim that TMX colluded  
19 with GECC in defrauding R. Lesniak. Accordingly, count three of the counterclaims will be  
20 dismissed with respect to both TMX and Sun.

### 21 3. Whether the fraud claim is time-barred

22 The parties agree that the applicable statute of limitations is Cal. Code. Civ. Proc. 338(d),  
23 which provides a three-year limitations period for an “action for relief on the ground of fraud or  
24 mistake.” Focusing on R. Lesniak’s allegations with respect to the 2003 New Credit Facility,  
25 Moving Counter-Defendants contend that the claim is time-barred. However, R. Lesniak alleges  
26 that the fraud was committed as late as 2009, when GECC and TMX allegedly “orchestrated the  
27 illegal take over of Teledex . . . .” (R. Lesniak’s Opp’n at 8:6-7.) Assuming that R. Lesniak can  
28 amend his claim to cure the defects discussed above, it is not clear that the fraud claim would be

1 time-barred.

2 **IV. DISPOSITION**

3 For the reasons discussed above, the motion to dismiss is GRANTED with leave to  
4 amend. Any amended counterclaims shall be filed within thirty (30) days of the date of this  
5 order.

6  
7 **IT IS SO ORDERED**

8 DATED: 11/15/ 2010

9   
10 JEREMY FOGEL  
11 United States District Judge