

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

EMC CORPORATION, a Massachusetts Corporation,  
  
Plaintiff,  
  
v.  
  
RON SHA, an individual; LILY SHA, an individual; RAVI NAMBOORI, an individual; and VISTA POINT SYSTEM, LLC, a California Limited Liability Corporation,  
  
Defendants.

) Case No.:13-CV-0118 EJD  
)  
) **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT RAVI NAMBOORI'S MOTION TO DISMISS; DENYING DEFENDANTS RON SHA, LILY SHA, AND VISTA POINT'S MOTIONS FOR JUDGMENT ON THE PLEADINGS; DENYING DEFENDANT RAVI NAMBOORI'S MOTION FOR SANCTIONS**

[Re: Docket Nos. 19, 24, 26, 29]

Presently before the court in this fraud action is defendant Ravi Namboori's Motion to Dismiss Plaintiff EMC Corporation's ("Plaintiff") Complaint (Dkt. No. 19), defendants Ron Sha, Lily Sha, and Vista Point System, LLC's ("Vista Point") respective Motion for Judgment on the Pleadings (Dkt. Nos. 24, 26), and defendant Ravi Namboori's Motion for Sanctions (Dkt. No. 29) . The court found these matters suitable for decision without oral argument pursuant to Civil L.R. 7-

1 1(b) and vacated the hearings. Having fully reviewed the parties' briefing, and for the following  
2 reasons, the Court GRANTS IN PART and DENIES IN PART Mr. Namboori's Motion to  
3 Dismiss, DENIES AS MOOT Mr. Sha, Mrs. Sha, and Vista Point's respective Motions for  
4 Judgment on the Pleadings, and DENIES Mr. Namboori's Motion for Sanctions.

5 **I. Background**

6 **a. The Parties**

7 Plaintiff is a Massachusetts corporation that "provides archiving, backup and recovery, big  
8 data, data center management, and enterprise content management services to customers all over  
9 the world." Compl., Dkt. No. 1 at ¶ 14. Plaintiff operates its Back Up and Recovery Division  
10 ("BRS Division") in Santa Clara, California. *Id.* Defendant Mr. Namboori worked in Plaintiff's  
11 BRS Division, under the supervision of co-defendant Ron Sha, from February 9, 2009 until his  
12 termination in October 2012. *Id.* at ¶ 16.

13 **b. Factual Background**

14 Msrs. Sha and Namboori previously worked together at Data Domain, Inc. *Id.* at ¶¶ 15-16.  
15 Plaintiff acquired Data Domain in July 2009 and integrated it into its BRS Division in Santa Clara.  
16 *Id.* at ¶ 3. Plaintiff hired Mr. Sha as Vice President of IT for the BRS Division, and Mr. Namboori  
17 to work under the supervision of Mr. Sha as the Director of Communications. *Id.* at ¶¶ 15-16.

18 Shortly after being hired by Plaintiff, Mr. Namboori signed a "receipt and  
19 Acknowledgment, of EMC's Business Conduct Guidelines," which indicated that he had received  
20 and read the EMC Business Conduct Guidelines ("Guidelines"), and understood that he was  
21 responsible for adhering to the principles set forth in the Guidelines. *Id.* at ¶ 19; EMC Business  
22 Conduct Guidelines, Dkt. No. 1-1.

23 The Guidelines set forth, in relevant part, the following instructions:

- 24 • Avoid any activity or personal interest that creates or appears to create a conflict  
25 between your interests and the interests of EMC or that might impair, or appears to



1 specific relief sought by the pleader. Fed. R. Civ. P. 8(a)(1)-(3). Although the pleader need not  
2 state “detailed factual allegations,” and well-pleaded allegations are accepted as true, the plaintiff  
3 must nevertheless “state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S.  
4 662, 663 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007)). Facial  
5 plausibility is achieved when “the pleaded factual content allows the court to draw the reasonable  
6 inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 663.

7 The pleader’s allegations will be accepted as true so long as certain pleading requirements  
8 are met. Id.; see also Twombly, 550 U.S. at 555-56. If a pleader’s allegations of wrongdoing are  
9 merely “threadbare recitals of a cause of action’s elements, supported by mere conclusory  
10 statements” a court will not accept the allegations as true. Iqbal, 556 U.S. at 663. The court can use  
11 its “experience and common sense” to determine if a cause of action is supported by mere  
12 conclusions or well-pleaded factual allegations. Id. at 664. “Legal conclusions can provide the  
13 complaint’s framework” but “they must be supported by factual allegations.” Id. Finally, “well-  
14 pleaded factual allegations” will carry a presumption of “veracity” and the court will determine  
15 whether it is plausible that the pleader is entitled to relief. Id.

16 Also relevant to the instant motion, Federal Rule of Civil Procedure 9(b) requires  
17 allegations of fraud to be accompanied by the “who, what, where, and how of the misconduct  
18 charged,” however, allegations of fraudulent concealment or omission require somewhat less  
19 specific averments of fraud. Noll v. eBay, Inc., 282 F.R.D. 462, 468 (N.D. Cal. 2012). “In the  
20 context of a fraudulent omission claim, a plaintiff cannot plead a specific time or place of a failure  
21 to act and may accordingly plead fraud in alternative ways.” Id. (citing Washington v. Baenziger,  
22 673 F. Supp. 1478, 1482 (N.D. Cal. 1987)). Nevertheless, a fraudulent concealment or omission  
23 claim must satisfy Rule 9(b), specifically by stating the misrepresentation or omission that the  
24 plaintiff relied on, whether the misrepresentation or omission induced plaintiff’s decision to take an  
25 action, or whether the plaintiff “would have acted differently had there been no misrepresentation.”  
26 Noll, 282 F.R.D. at 468.

1 **III. Discussion**

2 **a. Fraud by Material Concealment and Omission**

3 “Nondisclosure or concealment may constitute actionable fraud” when the defendant (1)  
4 was in a fiduciary relationship with the plaintiff; (2) had exclusive knowledge of material facts not  
5 known to the plaintiff; (3) actively concealed a material fact from the plaintiff; or (4) made partial  
6 representations but also suppressed some material facts. Deteresa v. American Broadcasting  
7 Companies, Inc., 121 F.3d 460, 467 (9th Cir. 1997). Whether a claim is actionable under any of the  
8 last three sets of circumstances, in which the defendant did not owe a fiduciary duty to the plaintiff,  
9 depends on the “existence of some other relationship between the plaintiff and defendant in which  
10 a duty to disclose can arise.” Id. (quoting LiMandri v. Judkins, 52 Cal. App. 4th 326, 337 (1997)).  
11 This kind of relationship giving rise to a duty to disclose material facts can be borne out of “any  
12 kind of contractual agreement.” Id. (quoting LiMandri, 52 Cal. App. 4th at 337).

13 Here, Plaintiff sufficiently pleads the existence of a relationship giving rise to a duty to  
14 disclose material facts by submitting evidence of the EMC Business Conduct Guidelines  
15 (“Guidelines”) that Mr. Namboori agreed to abide by during the course of his employment. Dkt.  
16 No. 1 at ¶ 39; Dkt. No. 1-1. Plaintiff alleges that Mr. Namboori signed a “receipt and  
17 Acknowledgement, of EMC’s Business Conduct Guidelines, which indicated that he had received  
18 and read the Guidelines and understood that he was responsible for adhering to the principles set  
19 forth in the Guidelines. Dkt. No. 1 at ¶ 19. The Guidelines required Mr. Namboori to “avoid any  
20 activity or personal interest that creates or appears to create a conflict between your interest and the  
21 interests of EMC....” Dkt. No. 1, Ex. 1 at 1. This contractual relationship, which inter alia, required  
22 Mr. Namboori to avoid the precise type of activity at issue in this case, sufficiently establishes the  
23 existence of a relationship giving rise to a duty to disclose material facts. See Deteresa, 121 F. 3d at  
24 467 (quoting LiMandri, 52 Cal. App. 4th at 3337).

25 As Plaintiff has pled the existence of a relationship giving rise to a duty to disclose material  
26 facts, the Court must go on to determine whether Plaintiff has successfully stated a claim for fraud

1 against Mr. Namboori. To state a claim for fraud, Plaintiff must allege: (1) a misrepresentation by  
2 false representation, concealment, or nondisclosure, (2) defendant’s knowledge of the falsity, (3)  
3 defendant’s intent to induce reliance, (4) justifiable reliance by Plaintiff, (5) and resulting damage  
4 to Plaintiff, all to the satisfaction of Rule 9(b). Kearns v. Ford Motor Co., 567 F.3d 1120, 1126 (9th  
5 Cir. 2009). Mr. Namboori alleges that Plaintiff has failed to meet the heightened pleading standard  
6 of Rule 9(b). The court reviews Plaintiff’s allegations as to each element in turn.

7 First, Plaintiff alleges that Mr. Namboori (1) omitted and misrepresented the nature of his  
8 relationship with the other Defendants; (2) misrepresented that “Vista Point was providing services  
9 that were of value to EMC when no such value existed;” and (3) misrepresented the “true amounts  
10 paid to contractors that Vista Point supplied to EMC.” Dkt. No. 1 at ¶¶ 39-41.

11 Second, Plaintiff alleges Mr. Namboori’s knowledge of the omissions or misrepresentations  
12 by stating that Mr. Namboori maintained a close relationship with the Defendants who allegedly  
13 formed Vista Point to defraud Plaintiff. Moreover, Plaintiff alleges that Mr. Namboori and Mr.  
14 Sha knew Mrs. Sha concealed her identity in her dealings with Plaintiff and used “this subterfuge  
15 to further their scheme to defraud EMC.” Dkt. No. 1 at ¶ 42. Plaintiff provides further allegations  
16 supporting Mr. Namboori’s knowledge by alleging that that he approved invoices for services sent  
17 from Vista Point to Plaintiff while concealing Mr. Sha’s relationship to Vista Point from other  
18 members of Plaintiff’s senior management. Id. at ¶ 31.

19 Third, Plaintiff alleges Mr. Namboori’s intent to induce Plaintiff’s reliance on the  
20 misrepresentations or omissions by alleging that Mr. Namboori intended that Plaintiff rely on his  
21 omissions and misrepresentations and continue to “pay substantial sums to Vista Point without  
22 EMC receiving significant value for Vista Point’s alleged services.” Id. at ¶ 42.

23 Fourth, Plaintiff alleges actual reliance on the misrepresentation by alleging that it paid  
24 Vista Point approximately \$4,776,869.69, over a period of thirty months, and would not have done  
25 so if it had been aware of Defendants’ conduct. Id. at ¶ 43; see Noll, 282 F.R.D at 468 (explaining  
26

1 that the party alleging fraud can satisfy the element of reliance by alleging that it would have acted  
2 differently had there been no misrepresentations or omissions by the defendant).

3 Fifth, Plaintiff alleges that it suffered financial injury because it would not have had to pay  
4 Vista Point for its services “but for Defendants’ fraudulent scheme.” Dkt. No. 1 at ¶ 44. Plaintiff  
5 further alleges that if Defendants had not engaged in the fraudulent scheme, it would have “based  
6 its decision on which staffing company vendor(s) to use based on merit, price, quality, performance  
7 and suitability of the product or service, as set forth in EMC’s Business Conduct Guidelines.” *Id.*

8 The above allegations are specific and clearly relate to the alleged fraud at the core of this  
9 case. As such, Plaintiff has satisfied Rule 9(b) in pleading its claim of fraudulent concealment or  
10 omission, and the court DENIES Mr. Namboori’s Motion to Dismiss as to Plaintiff’s First Cause of  
11 Action.

12 **b. RICO Violation**

13 Under RICO it is “unlawful for any person employed by or associated with any enterprise  
14 engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or  
15 participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of  
16 racketeering activity or collection of unlawful debt.” *Boyle v. U.S.*, 556 U.S. 938, 943-44 (2009)  
17 (quoting 18 U.S.C. § 1962(c)). A RICO claim must allege ““(1) conduct (2) of an enterprise (3)  
18 through a pattern (4) of racketeering activity.”” *Sanford v. Memberworks, Inc.*, 625 F.3d 550, 557  
19 (9th Cir. 2010) (quoting *Odom v. Microsoft, Corp.*, 486 F.3d 541, 547 (9th Cir. 2007) (en banc)).  
20 ““Racketeering activity is any act indictable under several provisions of Title 18 of the United  
21 States Code, and includes the predicate acts of mail fraud, wire fraud and obstruction of justice.””  
22 *Sanford*, 625 F.3d at 557 (quoting *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004)). The  
23 elements of RICO are interpreted broadly so as to “effectuate its remedial purpose.” *Boyle*, 556  
24 U.S. at 944; *see also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497 (1985) (“RICO is to be  
25 read broadly.”). Although the elements of a RICO claim are liberally construed, Plaintiff must  
26 allege the ““time, place, and manner of each fraud plus the role of each defendant in each scheme””

1 to properly state a claim for a violation of section 1962(a)-(c). Schreiber Distributing Co. v. Serv.-  
2 Well Furniture Co., Inc., 806 F. 2d 1393, 1401 (9th Cir. 1986) (quoting Lewis v. Sporck, 612 F.  
3 Supp. 1316, 1325 (N.D. Cal 1985)). Any RICO claim that fails to meet this standard should be  
4 dismissed for failure to state a claim. Sanford, 625 F.3d at 558.

5 Plaintiff fails to meet the heightened pleading standard required for RICO claims because,  
6 though it does likely allege the presence of a fraudulent scheme, it has not submitted sufficient  
7 factual allegations regarding the role of each defendant in the scheme. See Schreiber, 806 F. 2d at  
8 1401 (explaining that the plaintiff must describe the role of each defendant in the unlawful  
9 scheme). Plaintiff particularly fails to allege with specificity Mr. Namboori's role in the alleged  
10 unlawful scheme. See Dkt. No. 1 at ¶ 50-61. Plaintiff alleges that Defendants "had Vista Point  
11 submit invoices for approximately \$4,776869.69 for goods and services for which Vista Point  
12 received significant value and for which EMC did not receive significant value," and that  
13 Defendants "misrepresented the amount of payments received by contractors that Vista Point was  
14 providing to EMC." See id. at ¶¶ 53, 55. However, these allegations do not attempt to separate or  
15 untangle the individual roles of Mr. Namboori, Mr. Sha, and Mrs. Sha in perpetuating the scheme.

16 Additionally, Plaintiff fails to allege factual allegations sufficient to plausibly state that Mr.  
17 Namboori's unlawful conduct constitutes actionable "racketeering activity." Plaintiff alleges only  
18 that "Defendants' unlawful conduct described above constitutes indictable mail and wire fraud  
19 under 18 U.S.C. § 1341 and 18 U.S.C. ¶ 1343." Id. at ¶ 58. To allege a violation of mail fraud  
20 under Section 1341, Plaintiff must sufficiently plead "(1) the defendants formed a scheme or  
21 artifice to defraud; (2) the defendants used the United States mails or caused a use of the United  
22 States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to  
23 deceive or defraud." Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir. 2004) (quoting  
24 Schreiber, 806 F. 2d at 1400). Similarly, to allege a violation of wire fraud under Section 1343  
25 Plaintiff must sufficiently allege: (1) a scheme to defraud, (2), use of the wires in furtherance of the  
26 scheme, and (2) specific intent to defraud. U.S. v. McNeil, 320 F.3d 1034, 1040 (9th Cir. 2003). As



1 Plaintiff has neglected to include any factual allegations sufficient to connect Mr. Namboori's  
2 conduct to either of these claims associated with "racketeering activity." As such, Plaintiff has  
3 failed to allege a violation of the RICO statute. Accordingly, the Court GRANTS Mr. Namboori's  
4 Motion to Dismiss as to the Plaintiff's Third Cause of Action for violations of the RICO statute  
5 WITH LEAVE TO AMEND.

6 **c. Unfair Competition under Section 17200 of the California Business and**  
7 **Professions Code**

8 California's Unfair Competition Law ("UCL") prohibits businesses from engaging in  
9 unlawful, unfair, deceptive, or fraudulent business practices. See Cal. Bus. & Prof. Code §§ 17200  
10 et seq. The UCL applies separately to business practices that are (1) unlawful, (2) unfair, or (3)  
11 fraudulent. Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000).  
12 Plaintiff alleges that the Mr. Namboori's conduct applies to each of the UCL's three prongs. Dkt.  
13 No. 1 at ¶ 63.

14 The UCL proscribes "any unlawful" business practice by "borrowing" violations of other  
15 laws and treating them "as unlawful practices that the unfair competition law makes independently  
16 actionable." Chabner, 225 F.3d at 1048 (quoting Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel.  
17 Co., 20 Cal. 4th 163, 180 (1999)). Both statutory and common law violations can form the basis for  
18 a cause of action under the "unlawful" prong of the UCL. Mercado v. Allstate Ins. Co., 340 F.3d  
19 824, 829, n.3 (9th Cir. 2003); see also In re Facebook PPC Advertising Litigation, 709 F. Supp. 2d  
20 762, 771 (N.D. Cal. 2010) ("Plaintiffs' allegation of a systematic breach of contract is a sufficient  
21 predicate for unlawful business practices."). Because the court here finds that Plaintiff has stated a  
22 claim for fraudulent concealment or omission, the court also finds that Plaintiff has stated a claim  
23 under the "unlawful" prong of the UCL. See Section III.a. Having found that Plaintiff successfully  
24 stated a UCL claim, the court need not consider Plaintiff's allegations or Mr. Namboori's  
25 arguments relating to the remaining prongs. The Court DENIES Mr. Namboori's Motion to  
26 Dismiss with regard to the Plaintiff's Fourth Cause of Action.

1                   **d. Unjust Enrichment**

2                   A claim for unjust enrichment depends on the theory that one ““who has been unjustly  
3 enriched at the expense of another is required to make restitution to the other.”” Doe I v. Wal-Mart  
4 Stores, Inc., 572 F.3d 677, 684 (9th Cir. 2009) (quoting Restatement of Restitution § 1 (1937)).  
5 ““The person receiving the benefit is required to make restitution only if the circumstances are such  
6 that, as between the two individuals, it is unjust for the person to retain it.”” Wal-Mart, 572 F.3d at  
7 684 (quoting First Nationwide Sav. v. Perry, 11 Cal. App. 4th 1657, 1663 (1992)).

8                   Plaintiff’s claim for unjust enrichment is a restatement of the elements of a claim for unjust  
9 enrichment, devoid of any context-specific facts to support the claim:

10                   Defendants benefited in each and all of the acts alleged herein, and have benefited from  
11 the retention, use, investment, and reinvestment of the benefits thereof. As a result,  
12 Defendants have been unjustly enriched to their benefit and to the detriment of Plaintiff. As  
13 a result of the foregoing unjust enrichment, Defendants have a duty to Plaintiff EMC to  
14 account for and make restitution to Plaintiff....

15 Dkt. No. 1 at ¶ 68-69. Such legal conclusions cannot, by themselves, support a claim for unjust  
16 enrichment. Plaintiff has simply failed to include factual allegations from which the Court can  
17 “draw the reasonable inference that the defendant is liable for the misconduct alleged.” See Iqbal,  
18 556 U.S. at 663. Accordingly, the Court GRANTS Mr. Namboori’s Motion to Dismiss as to  
19 Plaintiff’s Fifth Cause of Action WITH LEAVE TO AMEND.

20                   **e. Aiding and Abetting Breach of Fiduciary Duty**

21                   In California, ““[a] party can be liable for aiding and abetting an intentional tort if...an  
22 individual is aware that the other’s conduct constitutes a breach of duty and provides substantial  
23 assistance or encouragement to the other to so act.”” In re First Alliance Mortg. Co., 471 F.3d 977,  
24 993 (9th Cir. 2006) (quoting River Colony Estates Gen. P’ship v. Bayview Financial Trading  
25 Group, Inc., 287 F. Supp. 2d 1213, 1225 (S.D. Cal. 2003)). Alternatively, a plaintiff may state a  
26 claim by alleging that the party gave “substantial assistance to the other in accomplishing a tortious

1 result and the person’s own conduct, separately considered, constitutes a breach of duty to the third  
2 person.” In re Brocade Communications Systems, Inc. Derivative Litigation, 615 F. Supp. 2d 1018,  
3 1050 (N.D. Cal. 2009) (citing Casey v. U.S. Bank Nat’l Ass’n, 127 Cal. App. 4th 1138, 1144  
4 (2005)). Essential to this claim is the plaintiff’s allegation that the defendant had ““actual  
5 knowledge of the specific primary wrong”” with which he substantially assisted. Alliance, 471 F.  
6 3d at 993 (quoting Casey, 127 Cal. App. 4th at 1145-46). “Actual knowledge” may be proven  
7 through “inference or circumstantial evidence.” Simi Management Corp. v. Bank of America,  
8 N.A., C-11-05573 DMR, 2013 WL 1089880, at \*14 (N.D. Cal. Mar. 15, 2013). A plaintiff may  
9 raise this cause of action against a party regardless if that party owes the plaintiff an independent  
10 fiduciary duty. Neilson v. Union Bank of California, N.A., 290 F. Supp. 2d 1101, 1134-36 (C.D.  
11 Cal. 2003).

12 Plaintiff’s Complaint contains no more than the following “threadbare recitals” of the  
13 elements for this cause of action:

14 Namboori....knew that Defendant Ron Sha was breaching his fiduciary duty to  
15 EMC....Namboori knowingly gave substantial assistance and/or encouraged Defendant  
16 Ron Sha to breach his fiduciary duty to EMC....By reason of Defendants Mrs. Sha,  
17 Namboori, and Vista Point’s aiding and abetting the unlawful, fraudulent and improper  
18 conduct as alleged herein, EMC has suffered substantial damages....

19 Dkt. No. 1 at ¶ 71-74. Such legal conclusions, unsupported by any factual allegations suggesting  
20 how Mr. Namboori knew that Mr. Sha risked breaching his fiduciary duty or how Mr. Namboori  
21 encouraged Mr. Sha in doing so, fails to meet the Rule 8 pleading standard. See Iqbal, 556 U.S. at  
22 663-64. Accordingly the court GRANTS Mr. Namboori’s Motion to Dismiss as to the Sixth Cause  
23 of Action WITH LEAVE TO AMEND.

24 **f. Accounting**

25 Plaintiff raises a claim for an accounting of “payments by Vista Point to Namboori” and  
26 other payments made among the Defendants. Dkt. No. 1 at ¶ 79. In this judicial district, a claim for

1 accounting typically may survive a motion to dismiss only if (1) the relationship between a plaintiff  
2 and defendant, such as a fiduciary relationship, calls for an accounting, and (2) the defendant owes  
3 a balance to the plaintiff that is too complicated to calculate without an accounting from the court.  
4 Bhandari v. Capital One, N.A., No. 12-CV-04533, slip op. at \*4 (N.D. Cal. Dec. 27, 2012); see also  
5 Hafiz v. Greenpoint Mortg. Funding, Inc., 652 F. Supp. 2d 1039, 1043 (N.D. Cal. 2009)  
6 (“Ordinarily, a plaintiff must demonstrate a fiduciary relationship between herself and the  
7 defendant as well as refer to a sum owed to her by the defendant in order to successfully bring a  
8 claim in equity for an accounting.”); Flores v. Wells Fargo Bank, N.A., C-11-6619 JSC, 2012 WL  
9 2427227, at \*6 (N.D. Cal. Jun. 26, 2012) (“In rare cases, an accounting can be a cause of action  
10 when a defendant has a fiduciary duty to a plaintiff which requires an accounting, and some  
11 balance is due to the plaintiff that can only be ascertained by an accounting.”).

12 Plaintiff correctly points out that under California law, evidence of a fiduciary duty owed to  
13 the plaintiff is not required to state a claim for an accounting. Rather “all that is required is that  
14 some relationship exists that requires an accounting.” See Teselle v. McLoughlin, 173 Cal. App.  
15 4th 156, 179 (2009). The Tesselle court found that if the defendants had been in control of the  
16 plaintiff’s business, a sufficient relationship would have been present to require an accounting  
17 because “the right to an accounting can arise from the possession by the defendant of money or  
18 property which, because of the defendant’s relationship with the plaintiff, the defendant is obliged  
19 to surrender.” Id. at 180. The Tesselle court cited Kritzer v. Lancaster, 96 Cal. App. 2d 1, 6-7  
20 (1950), which explained:

21 [W]here the allegations of the complaint show that the defendant was the trusted agent of  
22 the plaintiff, acting in a fiduciary capacity, and having for a long period of time the entire  
23 charge and control of plaintiff’s business, and that by various kinds of misconduct which  
24 are specially described, defendant caused losses and became liable in various sums of  
25 money, the true amounts of which cannot be ascertained and determined without an  
26 account, there is sufficient ground for an accounting in equity.

1 Id.

2 The court recognizes that, because the claim for an accounting is one of common law and  
3 not federal or constitutional law, it must look to California law to determine whether Plaintiff has  
4 successfully stated a claim. See Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). However, the  
5 court need not resolve the apparent conflict between Teselle and the findings of courts in this  
6 district, because even under the more deferential standard suggested by Teselle, Plaintiff has failed  
7 to state a claim for an accounting.

8 To properly plead a relationship other than a fiduciary duty that could give rise to a claim  
9 for an accounting, Plaintiff must allege at least that Mr. Namboori was in control of some aspect of  
10 the Plaintiff's business for some period of time, was Plaintiff's trusted agent, caused a loss to  
11 Plaintiff through specific misconduct, and is now liable to Plaintiff for the damages resulting from  
12 that misconduct. See Tesselle, 173 Cal. App. 4th at 179-80. The Court stresses that this pleading  
13 standard is not a lesser one than that which requires allegations of a fiduciary duty owed to  
14 Plaintiff. Rather, the pleading standard is just as substantial and may require a number of factual  
15 allegations to support a finding of plausibility.

16 Plaintiff only alleges that Mr. Namboori "had continuing duties to deal honestly and fairly  
17 with EMC, including without limitation by not intentionally concealing the fact that Defendant  
18 Mrs. Sha, the owner of Defendant Vista Point, was and is married to Defendant Mr. Sha." Dkt. No.  
19 1 at ¶ 77. Plaintiff further alleges that "Defendants have unlawfully received certain fees and other  
20 income from the wrongful conduct described above." Id. at ¶ 78. However, Plaintiff does not allege  
21 that Mr. Namboori was in control of any aspect of the business for any period of time, was a  
22 trusted agent of Plaintiff, or committed any specific misconduct that caused Plaintiff to lose some  
23 asset. As such, Plaintiff has failed to state a claim for an accounting as to Mr. Namboori, and the  
24 court GRANTS Mr. Namboori's Motion to Dismiss as to Plaintiff's Seventh Cause of Action  
25 WITH LEAVE TO AMEND.



1 Action are DISMISSED WITH LEAVE TO AMEND as against Mr. Namboori. Mr. Namboori's  
2 Motion is DENIED as to Plaintiff's First and Fourth Causes of Action.

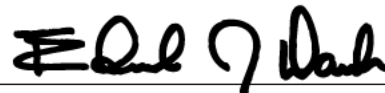
3 Any amended complaint must be filed within fourteen days of the date of this Order.  
4 Plaintiff is advised that it may not add new claims or parties without first obtaining Defendants'  
5 consent or leave of court pursuant to Federal Rule of Civil Procedure 15. Plaintiff is further advised  
6 that failure to amend the complaint in a manner consistent with this Order may result in the  
7 dismissal of this action.

8 Because Plaintiff's anticipated amended complaint will replace the original complaint as  
9 the operative complaint in this case, Mr. Sha, Mrs. Sha, and Vista Point's respective Motions for  
10 Judgment on the Pleadings (Dkt. Nos. 24 and 26) are DENIED AS MOOT. However, this denial is  
11 without prejudice and does not preclude Defendants from timely refileing their respective Motions  
12 for Judgment on the Pleadings addressing the amended complaint.

13 Additionally, having found that Plaintiff successfully stated at least two claims against Mr.  
14 Namboori, the court finds that Plaintiff's attorneys did not act in bad faith in violation of Federal  
15 Rule of Civil Procedure 11 in naming Mr. Namboori as a defendant in this matter. Accordingly,  
16 Mr. Namboori's Motion for Sanctions (Dkt. No. 29) is DENIED.

17 **IT IS SO ORDERED**

18 Dated: August 13, 2013

19 

20 EDWARD J. DAVILA  
21 United States District Judge