

United States District Court  
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

CHETAN UTTERKAR,  
Plaintiff,  
v.  
EBIX, INC., et al.,  
Defendants.

Case No.14-CV-02250-LHK  
**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**  
Re: Dkt. No. 63

Plaintiff Chetan Uttarkar<sup>1</sup> ("Plaintiff") brings this action against Defendants Ebix, Inc., Sudhir Bajaj, and Does 1 through 10 (collectively, "Defendants"). Before the Court is Plaintiff's motion for leave to file a Second Amended Complaint. ECF No. 63. The Court finds this motion suitable for decision without oral argument under Civil Local Rule 7-1(b) and hereby VACATES the motion hearing set for August 27, 2015, at 1:30 p.m. The case management conference set for August 27, 2015, at 1:30 p.m. remains as scheduled.

<sup>1</sup> The First Amended Complaint states that Plaintiff's name is "Chetan Utterkar," ECF No. 33, ¶ 1, but the proposed Second Amended Complaint states that his name is "Chetan Uttarkar," ECF No. 63, Ex. A. Plaintiff asserts in his motion for leave to file a Second Amended Complaint that the Second Amended Complaint has the correct spelling of his name. ECF No. 63.

1           Having considered the parties’ submissions, the record in this case, and the relevant law,  
2 the Court hereby GRANTS Plaintiff’s motion to file the proposed Second Amended Complaint as  
3 to the first through seventh causes of action against Defendant Bajaj, and DENIES Plaintiff’s  
4 motion to file the proposed Second Amended Complaint as to the remaining defendants and as to  
5 the eighth cause of action.

6           **I. BACKGROUND**

7           **A. Factual Background**

8           On or around April 3, 1999, Plaintiff and Bajaj, then President of PlanetSoft, Inc.  
9 (“PlanetSoft”), signed a Memorandum of Understanding (“MOU”) summarizing the terms and  
10 conditions of Plaintiff’s partnership with PlanetSoft. Proposed Second Am. Comp. (“SAC”), ECF  
11 No. 63, Ex. A, ¶¶ 20-21. The MOU required that Plaintiff would work half-time for PlanetSoft for  
12 three months and then either Plaintiff or his spouse, Marceline Uttarkar, would work full-time  
13 thereafter on “mutual consent of both parties.” First Am. Comp. (“FAC”), ECF No. 33, Ex. 1.<sup>2</sup>  
14 The agreement would also “be finalized upon at [sic] the end of the 3 months.” Id. The MOU  
15 detailed that Plaintiff would be working half-time “to develop new business in PlanetSoft’s area of  
16 specialty in the New York and New Jersey areas” at a salary of \$40,000.00/yr. prorated monthly.  
17 Id. That salary would increase to \$80,000.00/yr. for full-time work upon “mutual agreement” and  
18 “satisfactory full time focus.” Id. In addition, the MOU required that Plaintiff would “invest  
19 \$25,000.00 towards the equity of PlanetSoft.” Id.; SAC ¶ 23. The MOU provided that Plaintiff  
20 would receive 5 percent of the equity in PlanetSoft in exchange for one person’s full-time work  
21 and the \$25,000.00 investment. SAC ¶ 25; FAC Ex. 1. Plaintiff was further given the option to  
22 invest \$50,000.00 more for an additional 2.5 percent interest in PlanetSoft, but Plaintiff did not do  
23 so. SAC ¶ 24. Finally, the MOU noted that all equity would be vested as long as Plaintiff was  
24 “operationally participating in the growth and development of PlanetSoft business on a full time  
25

---

26 <sup>2</sup> The Court notes that although the SAC purports to refer to various exhibits, none of those  
27 exhibits are attached to the SAC. The Court therefore refers to the corresponding exhibits as  
28 attached to the FAC.

1 basis.” FAC Ex. 1. According to the MOU, if participation by Plaintiff was no longer full time,  
2 “equity will be bought back prorated on the basis of valuing the company at twice the current  
3 revenue.” SAC ¶ 27; FAC Ex. 1.

4 The MOU was written on PlanetSoft letterhead. SAC ¶ 21; FAC Ex. 1. The MOU was  
5 signed by Defendant Bajaj and by Plaintiff. FAC Ex. 1. The signed MOU was faxed to Plaintiff  
6 from PlanetSoft’s office and lists Bajaj’s PlanetSoft email address. Id. Plaintiff paid the  
7 \$25,000.00 initial investment to PlanetSoft. SAC ¶ 28. Plaintiff’s spouse, Marceline Uttarkar,  
8 worked full time at PlanetSoft from June 1999 until about February 2004. Id. ¶ 32. Plaintiff  
9 worked full time at PlanetSoft from September 2000 until about July 2001, at which point he  
10 ceased working at PlanetSoft due to 66 percent wage cuts. Id. ¶¶ 30-31.

11 Plaintiff alleges that he “requested and offered Defendants numerous opportunities from  
12 2003 through 2013 to buy back Plaintiff’s vested 5% equity” in PlanetSoft, and that “[s]ettlement  
13 discussions” took place during that period. Id. ¶ 46. In 2008, Defendant Bajaj and the former  
14 attorney for PlanetSoft, Shivbir Grewal, “discussed formal settlement/mutual release” with  
15 Plaintiff that “proposed to buy back Plaintiff’s 5% vested equity as well as reimburse Plaintiff for  
16 expenses and unpaid wages incurred during, relating to, and resulting from Plaintiff’s  
17 employment” with PlanetSoft. Id. ¶ 48. While the agreement was drafted, it was never executed  
18 because Defendant Bajaj “ceased all communications” with Plaintiff. Id. Plaintiff alleges that he  
19 “pursued and followed-up” with Defendant Bajaj from 2009-2011 to no avail. Id. ¶ 49.

20 Plaintiff alleges that around June of 2012, Ebix purchased all of PlanetSoft’s stock for  
21 approximately \$40 million dollars. Id. ¶ 56; FAC Ex. 2. Plaintiff alleges that Ebix “reportedly  
22 acquired all of the outstanding capital stock of [PlanetSoft] for \$35,000,000.00 in cash at closing,  
23 and \$5,000,000.00 payable in the form of 297,265 shares of the common stock of [Ebix] issued at  
24 closing.” SAC ¶ 57. The deal also “reportedly involve[d] earn-out cash payments to [PlanetSoft]  
25 shareholders, based on specific revenue numbers achieved” within two years. Id. Following the  
26 sale, Bajaj allegedly resumed communicating with Plaintiff by telephone and email “to discuss  
27

1 settlement and release of Plaintiff’s 5% vested equity” in PlanetSoft, but Bajaj did not inform  
2 Plaintiff of the sale to Ebix. Id. ¶¶ 50-54. After Plaintiff learned of the sale, Plaintiff contacted  
3 Ebix and Bajaj multiple times through counsel requesting compensation for Plaintiff’s 5 percent  
4 interest in PlanetSoft. Id. ¶¶ 61–62; FAC Ex. 3. Plaintiff has not received any compensation for  
5 his 5 percent interest in PlanetSoft. SAC ¶ 60.

6 Plaintiff resides in Santa Clara County, California. Id. ¶ 1. Ebix is a Delaware corporation  
7 headquartered in Atlanta, Georgia, and does business in California. Id. ¶ 4. Bajaj has residences  
8 in India, Florida, Georgia, and California. Id. ¶ 2, 14. Bajaj is the President of PlanetSoft, Inc., a  
9 former Delaware corporation whose primary place of business is Sacramento, California. Id. ¶ 2.

10 **B. Procedural History**

11 Plaintiff filed his original complaint on May 15, 2014. ECF No. 1. Defendant Ebix filed  
12 motions to dismiss and to transfer on July 21, 2014. ECF Nos. 15, 16. Plaintiff filed timely  
13 oppositions, ECF Nos. 18, 19, and Ebix filed timely replies, ECF Nos. 20, 21. On October 6,  
14 2014, the Court granted Ebix’s motion to dismiss Plaintiff’s breach of contract claim without  
15 prejudice. (“October 6, 2014 Order”), ECF No. 29. In the October 6, 2014 Order, the Court also  
16 denied Ebix’s motion to dismiss or transfer venue. Id.

17 Plaintiff filed his First Amended Complaint on October 23, 2014. FAC, ECF No. 33.  
18 Defendant Ebix filed a motion to dismiss on November 18, 2014. ECF No. 44. Plaintiff filed a  
19 timely opposition, ECF No. 49, and Ebix filed a timely reply, ECF No. 50. On March 18, 2015,  
20 the Court granted Ebix’s motion to dismiss Plaintiff’s breach of contract claim with prejudice.  
21 (“March 18, 2015 Order”), ECF No. 59.

22 While Plaintiff served Defendant Ebix on May 30, 2014, Plaintiff was unable to effectuate  
23 service on Defendant Bajaj as Plaintiff could not locate Bajaj. See ECF No. 52. On December 15,  
24 2014, Plaintiff filed a “Status Report re: Service upon Defendant Sudhir Bajaj.” Id. Plaintiff  
25 represented that on December 6, 2015, a Mr. Navipeta Mahest personally served a security guard  
26 at the gated entrance to Bajaj’s residence in Secunderabad, India. Id. Plaintiff also mailed the

1 documents to the residence and emailed the documents to Bajaj’s two last known email addresses  
2 on December 15, 2014. *Id.*

3 On December 29, 2014, Defendant Bajaj made a special appearance and filed a motion to  
4 dismiss for defective service, lack of personal jurisdiction, and failure to state a claim. ECF No.  
5 53. Plaintiff filed his opposition on January 12, 2015, ECF No. 54, and Bajaj filed a timely reply,  
6 ECF No. 55. On March 18, 2015, the Court granted Bajaj’s motion to dismiss for defective  
7 service without prejudice. ECF No. 59. The court further noted that Plaintiff had not sufficiently  
8 alleged facts showing that the Court’s exercise of personal jurisdiction over Bajaj would be  
9 appropriate. *Id.*

10 Plaintiff filed the instant motion for leave to file a Second Amended Complaint on April 1,  
11 2015. ECF No. 63. The proposed Second Amended Complaint would add PlanetSoft, Inc. and  
12 PlanetSoft Holdings, Inc. as defendants, remove the cause of action for breach of contract, and add  
13 seven new causes of action. *Id.* Defendant Bajaj made a special appearance and filed an  
14 opposition on April 15, 2015. ECF No. 68. Plaintiff filed a timely reply. ECF No. 69. Defendant  
15 Ebix filed its opposition on May 29, 2015, ECF No. 81, and Plaintiff filed a timely reply to Ebix’s  
16 opposition, ECF No. 85.

17 **II. LEGAL STANDARD**

18 Under Rule 15(a) of the Federal Rules of Civil Procedure, “[t]he court should freely give  
19 leave [to amend] when justice so requires,” bearing in mind “the underlying purpose of Rule 15 . .  
20 . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities.” *Lopez v.*  
21 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). Nonetheless, a district court may deny  
22 leave to amend a complaint due to “undue delay, bad faith or dilatory motive on the part of the  
23 movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice  
24 to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.” See  
25 *Foman v. Davis*, 371 U.S. 178, 182 (1962); see also *Leadsinger, Inc. v. BMG Music Publ’g*, 512  
26 F.3d 522, 532 (9th Cir. 2008). Of these considerations, “it is the consideration of prejudice to the  
27

1 opposing party that carries the greatest weight.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d  
2 1048, 1052 (9th Cir. 2003) (per curiam). “Absent prejudice, or a strong showing of any of the  
3 remaining Foman factors, there exists a presumption under Rule 15(a) in favor of granting leave to  
4 amend.” *Id.* (emphasis in original). Nevertheless, a proposed amendment may be denied as futile  
5 “if no set of facts can be proved under the amendment to the pleadings that would constitute a  
6 valid and sufficient claim or defense.” See *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th  
7 Cir. 1988). Ordinarily, however, “courts will defer consideration of challenges to the merits of a  
8 proposed amended pleading until after leave to amend is granted and the amended pleading is  
9 filed.” *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 539 (N.D. Cal. 2003).

### 10 **III. DISCUSSION**

11 Plaintiff argues that the proposed Second Amended Complaint alleges facts sufficient for  
12 the Court to properly exercise personal jurisdiction over Defendant Bajaj. ECF No. 63. In  
13 addition, the proposed Second Amended Complaint would rename fictitious Doe Defendants 1  
14 and 2 as PlanetSoft, Inc. and PlanetSoft Holdings, Inc. (collectively, “the PlanetSoft Defendants”),  
15 and replace the cause of action for breach of contract with seven new causes of action. *Id.*; SAC.  
16 The Court addresses the relevant Foman factors for each of these proposed changes separately.  
17 The Court begins by addressing whether the proposed SAC supports the exercise of personal  
18 jurisdiction over Defendant Bajaj. The Court next addresses the proposed inclusion of the  
19 PlanetSoft Defendants. Finally, the Court addresses the additional causes of action.

#### 20 **A. The Exercise of Personal Jurisdiction Over Defendant Bajaj**

21 The Court briefly describes its March 18, 2015 Order on Bajaj’s motion to dismiss the  
22 FAC before turning to the allegations related to personal jurisdiction in the SAC. In the March 18,  
23 2015 Order, the Court held that Plaintiff had not alleged facts sufficient to show that the Court  
24 could exercise personal jurisdiction over Defendant Bajaj. ECF No. 59. Specifically, the Court  
25 held that Plaintiff’s assertion in his briefing that Bajaj “personally owned property and lived in  
26 California at times relevant to this litigation until approximately 2012,” ECF No. 54 at 14-15, was  
27

1 insufficient to support the exercise of general jurisdiction over Bajaj because this assertion was not  
2 alleged in either the FAC or an affidavit. ECF No. 59. The Court further held that Plaintiff had  
3 not alleged a sufficient basis for the exercise of specific jurisdiction because Bajaj’s only  
4 California contacts alleged in the FAC were those of PlanetSoft, not Bajaj, and Plaintiff did not  
5 allege any nexus between PlanetSoft’s contacts with California and Plaintiff’s cause of action  
6 against Bajaj. Id. The Court cautioned that failure to cure the deficiency in alleging personal  
7 jurisdiction over Bajaj would result in a dismissal with prejudice. Id.

8 In the proposed SAC, Plaintiff alleges that “[o]n information and belief, at all material  
9 times, Defendant SUDHIR BAJAJ personally owed [sic] property and resided in the State of  
10 California.” SAC ¶ 14. Plaintiff additionally alleges that Defendant Bajaj directed PlanetSoft to  
11 conduct business in California. Id. ¶¶ 15-16.

12 Defendant Bajaj argues that Plaintiff’s allegations are insufficient to establish the Court’s  
13 personal jurisdiction over Bajaj, ECF No. 68 at 4-6, thus rendering the proposed amendments  
14 futile. A proposed amendment may be denied as futile only “if no set of facts can be proved under  
15 the amendment to the pleadings that would constitute a valid and sufficient claim or defense.” See  
16 Miller, 845 F.2d at 214 (9th Cir. 1988).

17 When there is no applicable federal statute governing personal jurisdiction, as is the case  
18 here, the law of the forum state determines personal jurisdiction. *Schwarzenegger v. Fred Martin*  
19 *Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). California’s long-arm statute, which determines  
20 personal jurisdiction, is coextensive with federal due process requirements, and therefore the  
21 analysis for personal jurisdiction is the same under both state and federal law. Id. at 800–01; Cal.  
22 Civ. Proc. Code § 410.10. There are three traditional bases for personal jurisdiction: physical  
23 presence, domicile, and consent. See, e.g., *Martin v. D-Wave Sys., Inc.*, No. 09-3602, 2009 WL  
24 4572742, at \*2 (N.D. Cal. Dec. 1, 2009). “[J]urisdiction based on physical presence alone  
25 constitutes due process because it is one of the continuing traditions of our legal system that define  
26 the due process standard of ‘traditional notions of fair play and substantial justice.’” *Burnham v.*

1 Superior Court of Cal., Cnty. of Marin, 495 U.S. 604, 619 (1990). The proposed SAC alleges that  
2 Bajaj lives in California. SAC ¶ 14. This is a sufficient allegation of Defendant Bajaj’s physical  
3 presence in California to support the exercise of personal jurisdiction over him. See Burnahm, 495  
4 U.S. at 619; see also Rupert v. Bond, No. 12-5292, 2013 WL 5272462, at \*12 (N.D. Cal. Sept. 17,  
5 2013) (“Here, the Court has jurisdiction over Zusman as he is a California resident.”).

6 Bajaj argues that the allegation in the proposed SAC that he lives in California should not  
7 suffice to establish the Court’s personal jurisdiction because the allegation is made only on  
8 “information and belief” without any supporting evidence. ECF No. 68 at 4. However, in  
9 evaluating personal jurisdiction based on the complaint, “uncontroverted allegations in plaintiff’s  
10 complaint must be taken as true, and conflicts between the facts contained in the parties’ affidavits  
11 must be resolved in plaintiff’s favor.” Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d  
12 1124, 1127 (9th Cir. 2010) (alterations omitted). Bajaj has not submitted any affidavit indicating  
13 that he does not live in California. Instead, Bajaj merely points to the Plaintiff’s opposition to  
14 Bajaj’s motion to dismiss the FAC, in which Plaintiff argued that Bajaj “personally owned  
15 property and lived in California at times relevant to this litigation until approximately 2012” to  
16 contradict the allegation in the proposed SAC. See ECF Nos. 54, 68. These assertions are not  
17 necessarily contradictory, because, for example, Bajaj may have owned property and lived in  
18 California until 2012 and then again from 2013 through the present. Moreover, the Court must  
19 resolve any conflict in Plaintiff’s favor. See Brayton Purcell LLP, 606 F.3d at 1127. Therefore,  
20 the proposed SAC would support the Court’s exercise of personal jurisdiction over Defendant  
21 Bajaj, and the proposed amendments are not thereby futile.

22 Defendant Bajaj does not challenge any of the remaining Foman factors with respect to the  
23 new jurisdictional allegations in the SAC. See ECF No. 68. This is Plaintiff’s first attempt to  
24 amend his complaint with respect to Defendant Bajaj, and in the March 18, 2015 Order, the Court  
25 granted Plaintiff leave to amend to cure the jurisdictional defects in the FAC. ECF No. 59. Thus,  
26 the Foman factor regarding repeated failure to cure deficiencies by amendments previously  
27



1 allowed does not apply. See Foman, 371 U.S. at 182. Plaintiff filed his proposed SAC by the  
2 deadline provided by the Court, see ECF No. 63 (Plaintiff’s motion filed April 1, 2015); ECF No.  
3 59 at 16 (March 18, 2015 Order giving Plaintiff until April 1, 2015 to file a SAC). As such,  
4 Plaintiff did not unduly delay making the proposed jurisdictional amendments. See Foman, 371  
5 U.S. at 182. Moreover, Bajaj has not shown that he would be prejudiced by the amendments nor  
6 has he made any allegation that the proposed amendments are made in bad faith. See *id.*  
7 Therefore, all of the Foman factors weigh in favor of permitting Plaintiff to amend the  
8 jurisdictional allegations in his complaint.

9 **B. The PlanetSoft Defendants**

10 The proposed SAC names PlanetSoft, Inc. and PlanetSoft Holdings, Inc. as defendants and  
11 asserts causes of action against the PlanetSoft Defendants for fraudulent transfer, unjust  
12 enrichment, fraud, negligent misrepresentation, breach of fiduciary duty, breach of the implied  
13 covenant of good faith and fair dealing, and breach of Delaware General Corporate Law. See SAC.

14 Defendant Bajaj argues that the inclusion of the PlanetSoft Defendants would deprive the  
15 Court of subject matter jurisdiction because the PlanetSoft Defendants are not diverse from  
16 Plaintiff. See ECF No. 68. Furthermore, the absence of subject matter jurisdiction would render  
17 the proposed amendments futile because there would be “no set of facts [that] can be proved under  
18 the amendment to the pleadings that would constitute a valid and sufficient claim.” See *Miller v.*  
19 *Rykoff-Sexton, Inc.*, 845 F.2d at 214.

20 The proposed SAC alleges that the PlanetSoft Defendants are incorporated in Delaware  
21 and have their principal place of business in Sacramento, California. SAC ¶¶ 2, 13. Plaintiff is a  
22 resident of Santa Clara, California. *Id.* ¶ 1. Plaintiff’s proposed causes of action are all based on  
23 state law, see *id.*, and Plaintiff alleges that the Court has jurisdiction over this action based on  
24 diversity of citizenship jurisdiction pursuant to 28 U.S.C. § 1332, SAC ¶ 8.

25 Because the U.S. Supreme Court has long interpreted the federal diversity jurisdiction  
26 statute, 28 U.S.C. § 1332, to require “complete diversity,” “the presence in the action of a single  
27

1 plaintiff from the same State as a single defendant deprives the district court of original diversity  
2 jurisdiction over the entire action.” Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546,  
3 553 (2005). Under the diversity jurisdiction statute, “a corporation shall be deemed to be a citizen  
4 of every State and foreign state by which it has been incorporated and of the State or foreign state  
5 where it has its principal place of business.” 28 U.S.C. § 1332(c)(1). According to the SAC, the  
6 PlanetSoft Defendants’ principal place of business is in California, SAC ¶¶ 13, so the PlanetSoft  
7 Defendants are citizens of California for purposes of determining diversity jurisdiction. Plaintiff  
8 is also a citizen of California. See id. ¶ 1. Accordingly, amending the complaint to include the  
9 PlanetSoft Defendants would destroy the Court’s only basis for subject matter jurisdiction. As  
10 such, the proposed inclusion of the PlanetSoft Defendants is futile, and the Court may deny  
11 Plaintiff leave to amend the complaint to include the PlanetSoft Defendants without analyzing the  
12 remaining Foman factors. See Miller, 845 F.2d at 214.

13 **C. The Additional Causes of Action**

14 The proposed Second Amended Complaint adds seven new causes of action: (1) the first  
15 cause of action, fraudulent transfer as to all defendants; (2) the second cause of action, unjust  
16 enrichment/quasi-contract as to all defendants; (3) the fourth cause of action, negligent  
17 misrepresentation as to all defendants; (4) the fifth cause of action, conversion as to all defendants;  
18 (5) the sixth cause of action, breach of fiduciary duty as to Bajaj and the PlanetSoft Defendants;  
19 (6) the seventh cause of action, breach of the implied covenant of good faith and fair dealing as to  
20 Bajaj and the PlanetSoft Defendants; and (7) the eighth cause of action, breach of Delaware  
21 General Corporate Law as to all defendants. See SAC. Additionally, the proposed Second  
22 Amended Complaint for the first time includes Defendant Ebix in the third cause of action for  
23 fraud. See SAC ¶¶ 82-101.

24 Defendant Bajaj opposes the proposed amendments on the grounds that the amendments  
25 would be futile. ECF No. 68. Defendant Ebix opposes the proposed amendments on the grounds  
26 that the motion for leave to amend is an improper request for reconsideration of the Court’s March  
27

1 18, 2015 Order, the proposed amendments are barred by laches, and the proposed amendments  
2 would be futile. ECF No. 81. Ebix’s argument that the motion is a request for reconsideration of  
3 the March 18, 2015 Order essentially challenges two of the Foman factors: that Plaintiff unduly  
4 delayed in seeking to add causes of action against Ebix and that Plaintiff failed to take advantage  
5 of his prior opportunity to amend his complaint. See *id.* at 6-7. Similarly, Ebix’s laches argument  
6 appears to challenge the Foman factors of futility, undue delay, prior amendment, and prejudice.  
7 See *id.* at 7-9. The Court addresses each of these Foman factors in turn. For each Foman factor,  
8 the Court addresses the factor as it relates to Defendant Ebix and Defendant Bajaj separately.

9 **1. Prejudice to the Opposing Parties**

10 The Court first considers whether granting Plaintiff leave to amend would prejudice either  
11 defendant, as prejudice to the opposing parties carries the “greatest weight” in the leave to amend  
12 inquiry. *Eminence Capital*, 316 F.3d at 1052. Prejudice has been found where the “parties have  
13 engaged in voluminous and protracted discovery” prior to amendment, or where “[e]xpense, delay,  
14 and wear and tear on individuals and companies” is shown. *Kaplan v. Rose*, 49 F.3d 1363, 1370  
15 (9th Cir. 1994); see also *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387-88 (9th Cir. 1990)  
16 (prejudice exists where permitting plaintiff to file an amended complaint will lead to “the  
17 nullification of prior discovery,” increase “the burden of necessary future discovery,” and the  
18 “relitigation of a [previously-decided] suit”).

19 Defendant Ebix argues that it would be prejudiced if the Court granted the motion for leave  
20 to amend because the amendment would “force Ebix to repeatedly brief motions to dismiss—and  
21 to incur unwarranted litigation costs.” ECF No. 81 at 9. Thus far, Ebix has filed two successful  
22 motions to dismiss. See ECF No. 29 (dismissing the sole cause of action against Ebix in the  
23 original complaint without prejudice); ECF No. 59 (dismissing the sole cause of action against  
24 Ebix in the FAC with prejudice). If the Court denies Plaintiff leave to amend the complaint to  
25 assert new causes of action against Ebix, Plaintiff would no longer have any causes of action  
26 against Ebix, and Ebix would no longer be a party to the case. See ECF No. 63; SAC. On the  
27

1 other hand, if the Court grants Plaintiff leave to assert new causes of action against Ebix, Ebix  
2 would have to continue litigation against Plaintiff. See SAC. Therefore, the proposed  
3 amendments would require Ebix to incur additional litigation expenses that Ebix would not  
4 otherwise face, thereby causing prejudice to Ebix. See Jackson, 902 F.2d at 1388 (“Putting the  
5 defendants through the time and expense of continued litigation on a new theory, with the  
6 possibility of additional discovery, would be manifestly unfair and unduly prejudicial.”) (quoting  
7 Priddy v. Edelman, 883 F.2d 438, 447 (6th Cir. 1989). Plaintiff correctly notes that this is not a  
8 case where the “parties have engaged in voluminous and protracted discovery” prior to  
9 amendment. See Kaplan, 49 F.3d at 1370; ECF No. 84 at 7. Indeed, the parties have not engaged  
10 in any discovery to date. See ECF No. 85 at 7; ECF No. 94 at 11. Nevertheless, the fact that Ebix  
11 has not yet had to invest resources in discovery for this case does not diminish the fact that Ebix  
12 would be prejudiced by having to continue litigating a case in which it has already secured  
13 dismissal with prejudice of all causes of action previously brought against Ebix. Therefore, the  
14 Court concludes that permitting Plaintiff to assert additional causes of action against Ebix would  
15 cause prejudice to Ebix.

16 By contrast, Defendant Bajaj does not argue that he would be prejudiced by the  
17 amendments, see ECF No. 68, and the record does not indicate that permitting amendment would  
18 prejudice Bajaj. Thus far, Bajaj has not been served with process in this case, has made only  
19 special appearances before the Court, and has engaged in no discovery. See ECF No. 68; ECF No.  
20 85 at 7. Unlike Plaintiff’s original claim against Defendant Ebix, Plaintiff’s original claim against  
21 Defendant Bajaj for fraud has not been dismissed with prejudice. See ECF No. 59. Unlike Ebix,  
22 Bajaj would not be prejudiced by his inclusion in the litigation at all. Additionally, the proposed  
23 additional causes of action arise from the same set of operative facts as Plaintiff’s original cause of  
24 action against Bajaj. Compare FAC ¶¶ 7-36 with SAC ¶¶ 19-63; see also ECF No. 63 at 6 (“[T]he  
25 facts giving rise to the proposed Causes of Action arise from the same transaction and occurrence  
26 as the Cause of Action for Fraud”). Therefore, it is unlikely that amending the complaint will  
27

1 increase “the burden of necessary future discovery.” Jackson, 902 F.2d at 1387.

2 For the reasons stated above, the Court finds that granting Plaintiff leave to amend by  
3 adding the additional causes of action would prejudice Defendant Ebix but would not prejudice  
4 Defendant Bajaj. Moreover, because Defendant Bajaj makes no showing of prejudice, Bajaj must  
5 make a “strong showing” of “any of the remaining Foman factors” to overcome the “presumption  
6 under Rule 15(a) in favor of granting leave to amend.” Eminence Capital, 316 F.3d at 1052  
7 (emphasis in original).

8 **2. Undue Delay**

9 Undue delay is the next factor a court considers in deciding whether to grant leave to  
10 amend. Foman, 371 U.S. at 182. Defendant Ebix argues that Plaintiff has made “no effort to  
11 explain why he waited until after his case against Ebix was dismissed with prejudice to assert the  
12 proposed claims.” ECF No. 81 at 8. Additionally, Ebix argues that Plaintiff’s proposed  
13 amendments are not based on any “newly discovered evidence,” but instead are “premised on the  
14 same set of facts alleged in Plaintiff’s first two complaints.” See ECF No. 81 at 6, 8 (emphasis in  
15 original).

16 Courts previously have found that a party unduly delayed when the party sought to amend  
17 a pleading with previously-known facts, particularly when the delay is accompanied by the  
18 requisite showing of other Foman factors such as prejudice. See, e.g., Texaco Inc. v. Ponsoldt,  
19 939 F.2d 794, 798-99 (9th Cir. 1991) (affirming denial of motion for leave to amend because of  
20 undue delay where, inter alia, moving party sought amendment “eight months after the district  
21 court granted summary judgment against it, and nearly two years after filing the initial complaint,”  
22 and “after discovery was over, just four and a half months before the trial date”); Jordan v. Los  
23 Angeles Cnty., 669 F.2d 1311, 1324 (9th Cir. 1982) (affirming denial of motion for leave to amend  
24 because of undue delay where the proposed amendment would have prejudiced the defendant by  
25 requiring “extensive, costly discovery in order to respond to the amended complaint”), vacated on  
26 other grounds, 459 U.S. 810 (1982); Kaplan, 49 F.3d at 1370 (affirming denial of leave to amend  
27

1 because of undue delay where the moving party sought amendment after discovery was completed  
2 and trial was only two months away, thereby substantially prejudicing the defendant).  
3 Furthermore, the Ninth Circuit has held that a district court may deny a motion to amend a  
4 complaint “when the movant presented no new facts but only ‘new theories’ and ‘provided no  
5 satisfactory explanation for his failure to fully develop his contentions originally.’” *Allen v. City*  
6 *of Beverly Hills*, 911 F.2d 367, 374 (9th Cir. 1990).

7 Here, all of the causes of action in Plaintiff’s proposed Second Amended Complaint are  
8 based on the same facts as Plaintiff’s original cause of action for fraud. See ECF Nos. 1, 63; SAC.  
9 Plaintiff therefore knew of the facts underlying the causes of action from the inception of the  
10 litigation in May of 2014—over ten months before Plaintiff filed the instant motion for leave to  
11 amend—but Plaintiff offers no explanation other than “inadvertence or mistake” for why these  
12 causes of action were not brought against Ebix earlier. See ECF No. 63 at 5. The Ninth Circuit  
13 has previously held that an unexplained delay of just eight months from the time the facts  
14 underlying a cause of action were known until the time of filing for leave to amend constituted an  
15 undue delay. See *Jackson*, 902 F.2d at 1388. Moreover, Plaintiff did not even assert his original  
16 cause of action for fraud against Ebix until after Ebix successfully obtained dismissal with  
17 prejudice of the only cause of action previously brought against Ebix. Particularly in light of the  
18 Court’s finding that Ebix would be prejudiced by the proposed amendments, the Court finds that  
19 Plaintiff unduly delayed in bringing these causes of action against Defendant Ebix.

20 Defendant Bajaj has not argued that Plaintiff unduly delayed in asserting additional causes  
21 of action against him. Given that Bajaj still has not been served with process in this case, the  
22 Court finds that Plaintiff did not unduly delay in seeking to amend the complaint against Bajaj.

23 **3. Prior Opportunity for Amendment**

24 In deciding whether to grant a party leave to amend, the district court also considers  
25 whether there has been a “repeated failure to cure deficiencies by amendments previously  
26 allowed” on the part of the moving party. *Foman*, 371 U.S. at 182. Defendant Ebix argues that  
27

1 the present motion “is essentially a motion for reconsideration of this Court’s March 18 Order”  
2 granting Ebix’s motion to dismiss the breach of contract claim with prejudice. See ECF No. 81 at  
3 6. Although Plaintiff did delay in alleging the proposed causes of action against Ebix until after  
4 all causes of action previously alleged against Ebix were dismissed with prejudice, the proposed  
5 additional causes of action were not directly addressed by Ebix’s previous motions to dismiss.  
6 Thus, the present motion does not require the Court to reconsider its dismissal of the cause of  
7 action for breach of contract. Nevertheless, “the district court’s discretion to deny leave to amend  
8 is particularly broad where plaintiff has previously amended the complaint.” *City of L.A. v. San*  
9 *Pedro Boat Works*, 635 F.3d 440, 454 (9th Cir. 2011). Because Plaintiff has already had an  
10 opportunity to amend his complaint in response to a motion to dismiss filed by Defendant Ebix,  
11 this factor also weighs in favor of denying Plaintiff leave to amend with respect to Ebix.

12 Because Ebix would be prejudiced by the proposed amendments, Plaintiff unduly delayed  
13 in bringing the new causes of action against Ebix, and Plaintiff has already had an opportunity to  
14 amend his complaint in response to a motion to dismiss filed by Ebix, the Court will not permit  
15 Plaintiff to assert the proposed causes of action in the SAC against Ebix.

16 As for Defendant Bajaj, the proposed SAC is Plaintiff’s first attempt to amend the  
17 complaint with respect to the causes of action brought against Bajaj. See ECF Nos. 53, 59.  
18 Plaintiff’s prior opportunity to amend his complaint in response to a motion to dismiss brought by  
19 Ebix does not overcome the presumption in favor of permitting amendment with respect to Bajaj.  
20 See *Eminence Capital*, 316 F.3d at 1052.

#### 21 **4. Futility**

22 Finally, a district court may deny a motion for leave to amend where amendment would be  
23 futile. *Foman*, 371 U.S. at 182. “[A] proposed amendment is futile only if no set of facts can be  
24 proved under the amendment to the pleadings that would constitute a valid and sufficient claim or  
25 defense.” *Miller*, 845 F.2d at 214. The Ninth Circuit has alternatively stated that the test of  
26 whether amendment would be futile is “identical to the one used when considering the sufficiency  
27

1 of a pleading challenged under Rule 12(b)(6).” *Id.* (citing 3 J. Moore, *Moore’s Federal Practice*  
2 ¶ 15.08[4] (2d ed. 1974)). Defendant Ebix and Defendant Bajaj both argue that Plaintiff’s  
3 proposed amendments are futile. See ECF Nos. 68, 81. Because Ebix has shown undue delay and  
4 prejudice, and because Plaintiff has already had an opportunity to amend the complaint with  
5 respect to Ebix, the Court need not address Ebix’s arguments that the proposed amendments  
6 would be futile as to Ebix. Therefore, the Court will address futility of the proposed amendments  
7 only as they relate to Bajaj.

8 Defendant Bajaj first argues that the proposed amendments would be futile because  
9 Plaintiff has yet to serve Bajaj. ECF No. 68. According to Bajaj, “Plaintiff’s purported plans for  
10 effective service on Mr. Bajaj in India are futile” and “Plaintiff has no proposed plan for serving  
11 Mr. Bajaj in the United States.” *Id.* at 3. Since Bajaj filed his opposition, Plaintiff has engaged in  
12 several further efforts to effect service of process on Bajaj. See ECF No. 90, Ex. 2 (describing  
13 Plaintiff’s efforts to serve Bajaj in California, Florida, Georgia, and India). Moreover, Plaintiff  
14 currently has pending before this Court an ex parte motion to serve Bajaj by publication and a  
15 motion to find that Bajaj has waived service. ECF Nos. 90, 93. In light of Plaintiff’s ongoing  
16 efforts to serve Bajaj in the United States and India, Bajaj’s argument that service would be futile  
17 is insufficient to overcome the presumption that leave to amend should be granted. See *Eminence*  
18 *Capital*, 316 F.3d at 1052.<sup>3</sup>

19 Based on the Court’s March 18, 2015 dismissal with prejudice of Plaintiff’s breach of  
20 contract claim against Ebix as time barred, Defendant Bajaj additionally argues that Plaintiff’s  
21 proposed additional causes of action are futile because they too are time barred. ECF No. 68.  
22 However, the March 18, 2015 Order addressed the statute of limitations and equitable estoppel  
23 only for Plaintiff’s original cause of action for breach of contract stemming from the dispute over  
24

---

25 <sup>3</sup> The Court notes that despite Bajaj’s assertions that he is not a party to this case, he is clearly  
26 aware of Plaintiff’s lawsuit and is an active participant in the litigation, having filed a motion to  
27 dismiss the FAC, ECF No. 53, an opposition to the present motion, ECF No. 68, and an opposition  
28 to Plaintiff’s motion to serve Bajaj by publication, ECF No. 91.



1 the MOU. ECF No. 59. Plaintiff’s proposed SAC omits the cause of action for breach of contract.  
2 See SAC. Instead, all of the proposed causes of action in the SAC relate to Defendants’ conduct  
3 in the June 2012 transaction between Ebix and PlanetSoft. See *id.* This is the same transaction  
4 that formed the basis of Plaintiff’s original claim for fraud. See ECF No. 1; FAC. “An  
5 amendment to a pleading relates back to the date of the original pleading when . . . the amendment  
6 asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or  
7 attempted to be set out—in the original pleading.” Fed. R. Civ. Proc. 15(c)(1). As alleged, the  
8 proposed causes of action all accrued in June 2012. See SAC. Because all of the proposed causes  
9 of action are alleged to arise out of the same transaction or occurrence as Plaintiff’s original claim  
10 for fraud, the causes of action relate back to the time of Plaintiff’s original complaint. See Fed. R.  
11 Civ. Proc. 15(c)(1). Plaintiff filed his original complaint in May 2014, less than two years after  
12 the Ebix-PlanetSoft transaction. ECF No. 1. The applicable statutes of limitations are three years  
13 for the claims arising out of fraud, mistake, and conversion, see Cal. Civ. Proc. Code § 338; four  
14 years for a claim of fraudulent transfer, see Cal. Civ. Code § 3439.09(a); two years for a claim of  
15 unjust enrichment/quasi-contract, see Cal. Civ. Proc. Code § 339; and either three or four years for  
16 breach of fiduciary duty, “depending on whether the breach is fraudulent or non-fraudulent,” see  
17 *Am. Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1479 (Cal. Ct. App.  
18 2014). The original complaint was filed within the statute of limitations for all of these claims.  
19 See ECF No. 1. Therefore, as alleged, the additional causes of action are timely.

20 Moreover, with regard to Defendant Bajaj, who has not shown prejudice, there is a  
21 presumption that leave to amend should be granted. *Eminence Capital*, 316 F.3d at 1052. Bajaj’s  
22 claim that the amendments are futile because they are untimely does not overcome that  
23 presumption, and any challenge Bajaj has to the timeliness of the proposed additional causes of  
24 action is better handled on a motion to dismiss. See *Netbula*, 212 F.R.D. at 539.

25 Bajaj additionally argues that Plaintiff’s proposed causes of action require him to have had  
26 an ownership interest in PlanetSoft in 2012, and that Plaintiff’s proposed Second Amended  
27

1 Complaint does not sufficiently allege such an ownership interest. See ECF No. 68 at 8-9. In the  
2 March 18, 2015 Order, the Court briefly addressed the issue of Plaintiff’s ownership of vested  
3 PlanetSoft stock as it pertained to whether Plaintiff had alleged equitable estoppel. ECF No. 59 at  
4 10. Because the March 18, 2015 Order was directed at ascertaining whether Defendants were  
5 equitably estopped from asserting a statute of limitations defense, the order was concerned  
6 primarily with whether Ebix or Bajaj had induced Plaintiff to believe that he continued to be a 5%  
7 owner in PlanetSoft. See *id.* Specifically, the Court stated:

8  
9 Furthermore, while Plaintiff argues in his opposition that he did not bring suit  
10 because Plaintiff believed that he continued to own a 5 percent stake in  
11 PlanetSoft, Plaintiff does not plead facts showing that his subjective belief was  
12 actually and reasonably induced by Bajaj or Ebix. That Plaintiff independently  
13 concluded that he would continue to own equity in PlanetSoft despite Plaintiff’s  
14 knowledge in 2004 that PlanetSoft had breached the MOU only undermines  
15 Plaintiff’s equitable estoppel claim, as Plaintiff has failed to sufficiently allege  
16 that it is *Defendants’ conduct* that induced this erroneous belief.

17 *Id.* at 10. Whether Defendants’ conduct indicated that Plaintiff had an ownership interest in  
18 PlanetSoft is distinct from the question of whether Plaintiff did in fact have such an ownership  
19 interest. Plaintiff’s proposed SAC alleges that Plaintiff did own a 5% interest in PlanetSoft at the  
20 time of the Ebix-PlanetSoft transaction, SAC ¶¶ 33, 39, and Plaintiff may be able to prove that,  
21 despite PlanetSoft and Bajaj’s alleged breach of the terms of the MOU, Plaintiff continued to own  
22 a 5% stake in the company in 2012. Bajaj has not shown that there is “no set of facts [that] can be  
23 proved under the amendment to the pleadings that would constitute a valid and sufficient claim,”  
24 Miller, 845 F.2d at 214, so he has not overcome the presumption in favor of granting leave to  
25 amend, see *Eminence Capital*, 316 F.3d at 1052.

26 Finally, the eighth cause of action in the proposed Second Amended Complaint is against  
27 all defendants for failure to allow Plaintiff to inspect the books and records of PlanetSoft and Ebix,  
28 in violation of Delaware General Corporate Law § 220(c). SAC ¶¶ 131-137. Delaware Code  
§ 220(c) gives stockholders the right to inspect a corporation’s books and records, but it gives the  
Delaware Court of Chancery “exclusive jurisdiction to determine whether or not the person

1 seeking inspection is entitled to the inspection sought.” Del. Code § 220(c). Thus, the Court lacks  
2 jurisdiction to adjudicate a cause of action arising under section 220(c), making the inclusion of  
3 this cause of action futile. See *Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P.*, 936 F.  
4 Supp. 2d 376, 405 (S.D.N.Y. 2013) (dismissing plaintiff’s claim under Del. Code § 220(c) for lack  
5 of subject matter jurisdiction because the Delaware Court of Chancery has exclusive jurisdiction  
6 over claims under section 220(c)). Because the Court lacks jurisdiction to adjudicate the eighth  
7 cause of action, the Court concludes that this cause of action is futile.

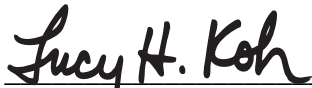
8 Therefore, the Court grants Plaintiff leave to amend the complaint to include the proposed  
9 first through seventh causes of action against only Defendant Bajaj.

10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court GRANTS Plaintiff’s motion for leave to file a Second  
12 Amended Complaint as to the first through seventh causes of action against Defendant Bajaj, and  
13 DENIES Plaintiff’s motion to file the proposed Second Amended Complaint as to the remaining  
14 defendants and as to the eighth cause of action.

15 **IT IS SO ORDERED.**

16  
17 Dated: August 25, 2015



18  
19 LUCY H. KOH  
United States District Judge