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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

RICHARD ALLEN CLARIDGE, individual
 and trustee of the Joint Revocable Trust of
 Richard Allen Claridge Jr. & Capri Lynn
 Winsor;
 CAPRI LYNN WINSER; individual and
 trustee of the Joint Revocable Trust of Richard
 Allen Claridge Jr. & Capri Lynn Winsor;
 TODD MICHERO, an individual;
 LORI MICHERO, an individual;
 BROOKE SAMPLE, individual and trustee of
 the First Amendment to the Brooke Sample
 Separate Property Trust;
 SCOTT A. WALKER, individual and trustee of
 The Walker Family Living Trust; and
 ELIZABETH L. WALKER, individual and
 trustee of The Walker Family Living Trust, on
 behalf of themselves and all others similarly
 situated,

Plaintiffs,

v.

TIMOTHY J. LEFEVER, an individual;
 KENNETH W. MATTSON, an individual;
 LEFEVER MATTSON, INC., a corporation;
 KS MATTSON PARTNERS, LP, a limited
 partnership;

[continued on next page]

Case No. 3:24-cv-04093-JST

**NOTICE OF MOTION AND MOTION OF
 TIMOTHY LEFEVER TO DISMISS
 PLAINTIFFS' CLASS ACTION
 COMPLAINT AND MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Date: November 14, 2024
 Time: 2:00 pm
 Judge: The Honorable Jon S. Tigar
 Crtrm.: Courtroom 6 – 2nd Floor

Trial Date: None Set

LEFEVER MATTSON I, LLC, a limited liability company;
 HOME TAX SERVICE OF AMERICA, INC. (d/b/a LEFEVER MATTSON PROPERTY MANAGEMENT), a corporation;
 DIVI DIVI TREE, LP, a limited partnership; and
 SPECIALTY PROPERTIES PARTNERS, LP, a limited partnership,
 Defendants.

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on November 14, 2024, at 2:00pm, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Jon S. Tigar, located in the United States Courthouse, Oakland Courthouse, Courtroom 6, 2nd Floor, 1301 Clay Street, Oakland, California 94612, Timothy LeFever (“LeFever”) will and hereby does move this Court to Dismiss Plaintiffs’ Class Action Complaint.

This Motion is made upon the following grounds: Plaintiffs’ Complaint must be dismissed against LeFever. Under Rule 12(b)(6) and Rule 8(a)(2), the Complaint fails to state any claim for relief against LeFever. Further, despite being required to under Rule 9(b), Plaintiffs fails to allege with “particularity” that LeFever committed any fraudulent conduct. In addition, under Rule 12(b)(7), the Complaint fails to join indispensable parties to this action.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, portions of Defendant Kenneth W. Mattson’s September 16, 2024 Motion to Dismiss, all of the pleadings, files, and records in this proceeding, all other matters of which the Court may take judicial notice, and any argument or evidence that may be presented to or considered by the Court prior to its ruling.

DATED: September 19, 2024

COBLENTZ PATCH DUFFY & BASS LLP

By: /s/Stan Roman
 STAN ROMAN
 Attorneys for Defendant
 TIMOTHY J. LeFEVER

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MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

Plaintiffs' Complaint should be dismissed as to Defendant Timothy LeFever ("LeFever") for one overriding reason. It does not plead facts supporting any claim that he engaged in wrongdoing. Instead, the Complaint paints a clear picture that Defendant Kenneth W. Mattson ("Mattson") defrauded investors. It attaches and relies heavily upon LeFever's explanation of how Mattson's misconduct was discovered, investigated and reported to authorities. Yet the Complaint nevertheless goes on to use group pleading to charge LeFever for the wrongdoing along with Mattson. It does so without pleading any facts to support the notion that LeFever defrauded anyone, was complicit in Mattson's misconduct, or was aware of any wrongdoing.

As a result, Plaintiffs' cause of action for fraud (Claim 1) fails because it does not factually allege that LeFever engaged in any fraudulent conduct, had any fraudulent intent, or caused loss to any Plaintiff. Similarly, Plaintiffs' claims for breach of fiduciary duty (Claim 2), conversion (Claim 3), violation of California Business and Professional Code section 17200 ("UCL") (Claim 4), elder abuse under California Welfare and Institutions Code § 15610.30 (Claim 6), and securities fraud under California's Corporate Code § 25401 (Claim 10) must be dismissed because the Complaint fails to allege facts supporting a claim that LeFever wrongfully took any Plaintiff's investment monies or participated in doing so.

Plaintiffs' causes of action for a constructive trust (Claim 4), an accounting (Claim 9), unjust enrichment (Claim 7), and declaratory judgment (Claim 5) should also be dismissed. All require that facts be pled to support a claim that a party participated in unlawfully taking possession of someone else's property. No such facts are pled as to LeFever.

In addition to the Complaint being dismissed for failure to allege facts supporting any claim against LeFever, the following causes of action should be dismissed for separate reasons: (1) Plaintiffs fiduciary duty claim fails because Plaintiffs do not plead a fiduciary relationship; (2) Plaintiffs' elder abuse claim fails because they do not plead that they were elders; (3) unjust enrichment and constructive trust are remedies not causes of action; (4) Plaintiffs lack standing; (5) Plaintiffs have failed to join the LP's and LLC's as indispensable parties; and (6) Plaintiffs'

California Corporations Code § 25019 claim fails because they have not adequately pled that their investments were in “securities.”

BACKGROUND

In the early 1990s, Mattson and LeFever formed a real-estate investment corporation which became known as LeFever Mattson (“LM”). They were its sole owners. Compl. ¶¶ 29–30. LM created limited partnerships (“LP’s”) and limited liability companies (“LLC’s”) to purchase investment properties. LM was the general partner or managing member of the LPs and LLC’s. *Id.* ¶ 34. Limited partner and non-managing member interests were sold to outside investors. *Id.* ¶ 37.

Until early 2024, Mattson was LM’s CEO. *Id.* ¶¶ 80–81. LeFever had the title of Secretary. Both were directors of LM. LeFever was never a general partner of any of the investment LPs or a manager of any of the LLCs. *See id.* ¶ 13. The Complaint quotes a statement by LeFever that, “most of the outside investors were Mattson’s current or former clients or other contacts Mattson developed while he was working as a securities broker.” *Id.* ¶ 34.

According to the Complaint, as time went on, Mattson began abusing his relationships with investors and his control over LM. As one example, LM had formed an investment LP named Divi Divi Tree. *Id.* ¶ 69. The Complaint borrows allegations from LeFever’s subsequent lawsuit against Mattson (“LeFever Complaint” or “LC”)¹ explaining that after the original investors had purchased interests in Divi Divi, Mattson began to sell purported interests in Divi Divi to new investors, and convinced those investors to transfer their purchase money into an account that he controlled. *See* Compl. ¶¶ 69–70, 74 (citing to LeFever Complaint); *see also* LC Compl. ¶¶ 60, 68. Mattson pocketed those proceeds. *Id.* ¶¶ 60–62. LeFever alleges that, to hide his misconduct,

¹ On June 6, 2024, LeFever filed a complaint in *Timothy LeFever, v. Kenneth W. Mattson.*, Case No. 24CV03485 (Sonoma Superior Court). Plaintiffs rely directly on LeFever’s Complaint and attach it as Exhibit C to their own Complaint. *See, e.g.*, Compl. ¶¶ 27–29, 33, 69–70, 74–76, 85. As such, LeFever’s Complaint may be considered when evaluating the sufficiency of Plaintiff’s allegations. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (“A court may consider evidence on which the complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the authenticity of the copy[.]”) (citation omitted).

1 Mattson withheld sales information from LeFever, to have given new investors “fake K-1 forms,”
2 and to have paid them distributions from his own money. *See id.* ¶¶ 65–67.

3 According to the Complaint, LeFever sent a letter to investors this year in which he told
4 them that after being confronted, Mattson admitted wrongdoing. Compl. *Id.* ¶ 91. Mattson
5 resigned as CEO and LeFever took over as LM’s CEO and CFO. *Id.* ¶¶ 80–81

6 Also according to the Complaint, the Federal Bureau of Investigation raided Mattson’s
7 Sonoma County home on May 24, 2024 and the Department of Justice, the United States Attorney
8 for the Northern District of California, and the Office of Inspector General for the United States
9 Postal Service are investigating Mattson. *Id.* ¶ 84.

10 ARGUMENT

11 To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a
12 complaint must contain “a short and plain statement of the claim showing that the pleader is
13 entitled to relief.” *Ecological Rts. Found. v. PacifiCorp*, No. 23-CV-05179-JST, 2024
14 WL 3186566, at *4 (N.D. Cal. June 26, 2024) (citation omitted). The facts alleged must be
15 “enough to raise a right to relief above the speculative level,” *i.e.* “more than a sheer possibility
16 that a defendant has acted unlawfully.” *Id.* (citations omitted).

17 When fraud is an “essential element” of a plaintiff’s allegations—as it is here—the
18 Complaint must fulfill Rule 9(b)’s heightened pleading standards. *See Vess v. Ciba-Geigy Corp.*
19 *USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). Rule 9(b) requires that fraud allegations be pled with
20 “particularity” and “be specific enough to give defendants notice of the particular misconduct so
21 that they can defend against the charge[.]” *Elgindy v. AGA Serv. Co.*, No. 20-CV-06304-JST,
22 2021 WL 1176535, at *4 (N.D. Cal. Mar. 29, 2021) (citation omitted). As such, fraud allegations
23 must include “an account of the time, place, and specific content of the false representations as
24 well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d
25 756, 765 (9th Cir. 2007) (citation omitted).

26 **I. The Complaint fails to allege that LeFever committed fraud (Claim One).**

27 The elements of a cause of action for fraud in California are: “(a) misrepresentation (false
28 representation, concealment, or *nondisclosure*); (b) knowledge of falsity (or ‘scienter’); (c) intent

1 to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.” *Kearns v.*
 2 *Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009) (citing *Engalla v. Permanente Med. Group,*
 3 *Inc.*, 15 Cal.4th 951, 974 (1997)). The Complaint does not plead facts supporting any of these
 4 elements as to LeFever.

5 **A. Plaintiffs have not alleged that LeFever made any false representations.**

6 To successfully plead a fraud claim, a plaintiff “must associate a particular defendant with
 7 a particular set of statements and specify the contents of the statement.” *Destfino v. Kennedy*, No.
 8 CV-F-08-1269 LJO DLB, 2009 WL 743048, at *7 (E.D. Cal. Mar. 18, 2009). A complaint that
 9 merely alleges in “general terms that the defendants inspired, encouraged, and condoned [the
 10 fraudulent activities]” must be dismissed. *Id.* Indeed, “Rule 9(b) does not allow a complaint to
 11 merely lump multiple defendants together” but instead “require[s] plaintiffs to differentiate their
 12 allegations when suing more than one defendant . . . and inform each defendant separately of the
 13 allegations surrounding his alleged participation in the fraud.” *Swartz*, 476 F.3d at 764–65
 14 (citation omitted).

15 There are only three purportedly false statements alleged in the Complaint: (1) that “money
 16 invested with Defendants would be applied to the acquisition of a specific real property owned by
 17 the partnership” (2) that “the partnership would maintain a separate bank account in the name of
 18 the partnership into which the proceeds would be deposited”; and (3) that “payments to investors
 19 would come from the partnership’s proceeds through the management and sale of those
 20 properties.” *See* Compl. ¶¶ 138, 35.

21 Despite identifying these three alleged misrepresentations, the Complaint does not allege
 22 *who* made the representations to them, and does not suggest it was LeFever. The Complaint also
 23 fails to allege the “time” or “place” of the alleged misrepresentations, leaving Mr. LeFever to
 24 guess the context of the alleged misrepresentations. *Schreiber Distrib. Co. v. Serv-Well Furniture*
 25 *Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Instead, the Complaint engages in improper group
 26 pleading and attributes the statements to an undifferentiated group of “Defendants.” That is not
 27 enough to put LeFever on notice of the specific claims asserted against *him*. *See Hart v. Bayview*
 28 *Loan Servicing*, No. 2:16-CV-01309-CAS(AFMx), 2016 WL 3921139, at *7 (C.D. Cal. July 18,

2016) (allegations that “all defendants” participated in fraudulent scheme was insufficient to plead fraud with particularity); *Mostowfi v. 12 Telecom Int’l, Inc.*, No. C 03-5784 VRW, 2004 WL 7338797, at *9 (N.D. Cal. May 27, 2004) (general allegations that defendants “assisted” other defendants and worked as “fiduciaries” to a related party failed to identify “specific statements or representations” that could support fraud claim.); *Castro v. Home Cap. Funding*, No. 09CV1347-WQH-JMA, 2009 WL 3618898, at *6 (S.D. Cal. Oct. 28, 2009) (dismissing fraud claim because the complaint failed to identify “the specific content of the false representations as well as the identities of the parties to the misrepresentations[.]”) (citation omitted).

In the absence of specific allegations about LeFever, it is implausible to infer that he made any of the false representations. “[M]ost of the outside investors were Mattson’s current or former clients or other contacts *Mattson* developed while working as a broker.” Compl. ¶ 34. (emphasis added). Conversely, there are no allegations that any of the Plaintiffs had any contact with LeFever that played a part in their investment decisions. The only detailed allegations in the Complaint show that *Mattson*, not LeFever, solicited investments from each of the Plaintiffs:

TABLE 1	
Plaintiff	Relationship with Mattson
Claridge	<ul style="list-style-type: none"> Wisner and Claridge committed their life savings to “Mattson’s portfolios”. Compl. ¶ 96. Alleges to have purchased an interest in two properties from “KS Mattson Partners LP”. <i>Id.</i> ¶¶ 97–99.
Michero	<ul style="list-style-type: none"> Allegedly invested in a LP where “KS Mattson Partners LP” was a general partner in. <i>Id.</i> ¶ 104. After liquidating their ownership interest, “Mattson represented” that the amount paid was “their ownership interest” in the LP. “Mattson” allegedly also provided “conclusory information” about monthly distributions and remaining ownership value to Plaintiffs. <i>Id.</i> ¶ 105. Allegedly withdrew monies from Divi Divi Tree, and received a communication from “Mattson” remaining the remainder of the balance. <i>Id.</i> ¶ 108.

TABLE 1

Plaintiff	Relationship with Mattson
Sample	<ul style="list-style-type: none"> Allegedly brought into LPs “otherwise associated with Ken Mattson”. <i>Id.</i> ¶ 111.
Walkers	<ul style="list-style-type: none"> Allegedly purchased LM-affiliated investment entities from transfer agreements “signed by Ken Mattson” (<i>Id.</i> ¶ 119) and through investments “acquired through and from KS Mattson Partners LP” (<i>Id.</i> ¶ 120). “Mattson subsequently asked Walker Plaintiffs to allow a personal interest-only loan” against a separate house purchase (<i>Id.</i> ¶ 121). “Ken Mattson also took over Scott Walkers’ invested IRAs” to invest in a separate LLC. <i>Id.</i> ¶ 122

B. Plaintiffs have not alleged that LeFever knew of Mattson’s fraud or had an intent to defraud investors.

In addition to failing to allege any false representation made by LeFever, the Complaint also fails to allege that LeFever had knowledge of falsity (i.e., scienter) or the intent to defraud. A complaint cannot merely assert that a defendant “knew or should have known” of a fraudulent act. *Elgindy*, 2021 WL 1176535, at *14. Allegations of scienter must be “plausible” and “conclusory allegations” that “representations or omissions were intentional and for the purpose of defrauding and deceiving [an individual] are insufficient” and justify dismissal of the complaint. *Ablaza v. Sanofi-Aventis U.S. LLC*, No. 21-CV-01942-JST, 2022 WL 19517298, at *5 (N.D. Cal. July 12, 2022) (citations and ellipses omitted).

The Complaint fails to allege facts to suggest that LeFever *knew* of Mattson’s fraud. Instead, Plaintiffs group plead that “Defendants” intended to deceive investors. Compl. ¶ 141. Such conclusory allegations are insufficient. *Cf. Nathanson v. Polycom, Inc.*, 87 F. Supp. 3d 966, 980 (N.D. Cal. 2015) (in securities context, “generalized claims about corporate knowledge [that] offer[] no reliable personal knowledge concerning the individual defendants’ mental state’ are insufficient to satisfy the scienter requirement) (citation omitted). The allegation is also belied by

1 the explanation in LeFever’s Complaint of how Mattson’s misconduct was discovered. *See* LC
2 ¶¶167-170, 17.

3 C. **The Complaint fails to allege that LeFever engaged in any fraudulent conduct**
4 **after Mattson left LM.**

5 Plaintiffs assert that, after Mattson left LM in April 2024, LeFever continued to perpetuate
6 Mattson’s fraudulent scheme. *See* Compl. ¶¶ 94-95. The sole factual support pled for this theory is
7 a June 27 letter from LeFever to LM investors. In that letter, LeFever updated investors that LM
8 was attempting to unwind the “chaos” created by Mattson, and that to do so, LM would be selling
9 properties and informing relevant investors about their sale when “appropriate.” *Id.*; *see also*
10 Compl. Ex B (attaching June 27 email). From this, Plaintiffs leap to the illogical conclusion that
11 LeFever and LM were continuing to “improperly commingl[e]” proceeds and otherwise continue
12 to perpetuate Mattson’s fraud. Compl. ¶ 95.

13 Notably, the Complaint does not allege that any statement made in the June 27 letter was
14 false or misleading. The gist of the letter was that, after recognizing the “chaos caused” by
15 Mattson, LM had begun the process of selling properties and paying the sales proceeds to
16 investors. *See* Compl. Ex. B. The Complaint does not dispute—and actually accepts as true—that
17 LM actually was in the process of selling properties and paying proceeds to the corresponding
18 investors. Compl. ¶¶ 94-95.

19 Plaintiffs speculate that LeFever may be improperly comingling funds, but the June 27
20 letter provides no basis for that assertion. The letter does not (i) state what investors were, or
21 would be, paid nor (ii) the procedures by which those investors were, or would be, paid, nor (iii)
22 the manner in which sales proceeds would be held until paid to investors. It offers no basis from
23 which to draw the conclusion that LeFever was doing anything improper, much less continuing
24 Mattson’s fraud. Indeed, a claim that LeFever was continuing Mattson’s fraud is implausible
25 because, by the time of his June 27, 2024, letter, *LeFever* had already filed a public lawsuit against
26 Mattson disclosing Mattson’s fraud in great detail. Compl. Ex. C [LeFever Complaint] (filed on
27 June 6, 2024). The plain, and only plausible, inference that can be drawn from the June 27 Letter
28 is that LM had begun the process of winding down the LPs and LLCs by marketing and selling

1 their real estate assets for sale, and as sales were completed, paying out the net proceeds to that
2 LP's or LLC's investors.² The Complaint pleads no facts that suggest otherwise.

3 **II. The Complaint fails to allege that LeFever breached a fiduciary duty (Claim Two).**

4 Plaintiffs do not allege that LeFever was a General Partner in any of the LM-related LPs or
5 a managing member of LM-related LLCs. *See id.* ¶ 13. The corporation LM was. The Complaint
6 nonetheless accuses LeFever individually of violating a purported fiduciary duty by allegedly
7 “mismanaging” the Plaintiffs’ investments. *Id.* ¶¶ 147–50. No facts are pled to support the
8 existence of a fiduciary duty.

9 A breach of fiduciary duty claim has three elements: (1) the existence of a fiduciary duty;
10 (2) a breach of that duty; and (3) resulting damage. *See City of Atascadero v. Merrill Lynch,*
11 *Pierce, Fenner & Smith, Inc.*, 68 Cal.App.4th 445, 483 (1998). A fiduciary duty may exist (a)
12 formally, from a legal relationship that gives rise to a fiduciary duty by operation of law or (b)
13 informally, when parties relationship is close enough there is “control by a person over the
14 property of another.” *Apollo Cap. Fund, LLC v. Roth Cap. Partners, LLC*, 158 Cal.App.4th 226,
15 246 (2007) (citation omitted).

16 The Complaint does not allege that LeFever had any formal, fiduciary relationship with the
17 Plaintiffs that arose by operation of law. Officers and directors of the general partner of a limited
18 partnership do not owe individual, fiduciary duties to the limited partners. *In re Real Est. Assocs.*
19 *Ltd. P’ship Litig.*, 223 F. Supp. 2d 1109, 1134 (C.D. Cal. 2002) (dismissing fiduciary duty claim
20 against officers and directors of the general partner of a limited partnership). LeFever is not
21 alleged to have been an officer or director of any LM-affiliated LP or LLC.³

22
23 ² In addition, Plaintiffs do not allege any damages tied to conduct that occurred after Mattson left
24 LM in April 2024. *See* Compl. ¶ 95. There is no allegation that any Plaintiff was induced to give
25 LM further monies after reading the June 27 letter, and no allegation that any Plaintiff was entitled
26 to receive, but did not receive, a share of the proceeds from the sale of any real property. *See*
27 *Banga v. Kanios*, No. 16-CV-04270-RS, 2016 WL 7230870, at *5 (N.D. Cal. Dec. 14, 2016)
(conclusory allegations that damages attached to misrepresentation were insufficient to preclude
dismissal of fraud claim).

28 ³ Plaintiffs allege that LeFever was a registered agent of some of the LM-affiliates. *See* Compl.
Ex. A. But while a corporation or partnership may appoint a registered agent for purposes of

1 The Complaint also does not allege facts supporting the existence of an informal fiduciary
 2 relationship with the Plaintiffs during the course of Mattson’s misconduct. To establish such a
 3 relationship, Plaintiffs must allege sufficient facts to show that LeFever had control over the
 4 Plaintiffs’ investments. For example, in *Apollo*, 158 Cal.App.4th at 245, the plaintiff did not allege
 5 that “investors were [defendant’s] customers or had any other preexisting relationship with
 6 [defendant].” Without more, the plaintiff could not establish a fiduciary relationship between the
 7 parties. *See id.* at 246. *Apollo*’s holding applies here. Plaintiffs’ made their investments through
 8 Mattson—not LeFever. *See* Table 1, *supra*. Plaintiffs have not alleged any similar pre-existing
 9 relationship with LeFever. Nor do they allege that LeFever was entrusted with “control” over
 10 Plaintiffs’ investments at any point prior to Mattson’s resignation.

11 Even if such a fiduciary relationship existed—and it did not—Plaintiffs have failed to
 12 allege that LeFever breached any duty owed to them. Plaintiffs’ fiduciary duty claim relies on the
 13 same fraud-based allegations related to the purported failure to “manage” investor funds. *See*
 14 Compl. ¶ 148. As such, Plaintiffs’ fiduciary-duty claim must also satisfy Rule 9(b)’s requirement
 15 to allege fraud with “particularity.” *Talece Inc. v. Zheng Zhang*, No. 20-CV-03579-BLF, 2020
 16 WL 6205241, at *4 (N.D. Cal. Oct. 22, 2020) (applying Rule 9(b) pleading requirements to
 17 fiduciary duty claim when claim sounded in fraud). The Complaint does not meet that pleading
 18 requirement. There are no non-conclusory allegations establishing that LeFever ever had a role in
 19 managing Plaintiffs’ investments. *See* Argument, *supra* I. A–C. There are no well-pled facts
 20 showing that LeFever breached any duty in connection with the property sales and investor
 21 payments described in his June 27 letter. The Complaint does not allege that any specific LM-
 22 affiliate sold any property, or that any sales proceeds were not returned to the investors in that
 23 LM-affiliate. As such, Plaintiffs’ fiduciary-duty claim against LeFever must be dismissed.⁴

24 _____
 25 service of process (*see* Cal. Corp. Code § 1505(a); *id.* § 15901.16 (b)), “[t]he scope of a registered
 26 agent’s agency is to receive and transmit notices and process.” *Int’l Env’t Mgmt., Inc. v. United*
 27 *Corp. Servs., Inc.*, 858 F.3d 1121, 1125 (8th Cir. 2017) (citation omitted). A registered agent
 would have no fiduciary duties related to the managing of any investment monies, making that
 relationship irrelevant to Plaintiffs’ claims.

28 ⁴ To the extent Plaintiffs assert that LeFever breached a duty of care in managing Plaintiffs’ funds,

III. The Complaint fails to allege a claim against LeFever for conversion (Claim Three).

Plaintiffs' claim for conversion must be dismissed because, as discussed above, the Complaint fails to allege any wrongful act attributable to LeFever. A conversion claim is based on the "wrongful exercise of dominion over the property of another." *Welco Elecs., Inc. v. Mora*, 223 Cal.App.4th 202, 208 (2014) (citation omitted). The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. *Id.* Mirroring their claim for fraud, Plaintiffs assert that "Defendants" interfered in their property—the money they invested—by allegedly (a) "misusing it" and (b) refusing to return it. Compl. ¶ 153. Because Plaintiffs' claim relies on the same allegations giving rise to their fraud claim, their conversion claim must also fulfill Rule 9(b)'s requirements. *See Lazar v. Grant*, No. CV 17-00309-RGK (PJWx), 2017 WL 4805067, at *3 (C.D. Cal. June 22, 2017) (conversion claim must fulfill Rule 9(b)'s requirements because it was based on averments of fraudulent conduct).

The Complaint fails to allege that LeFever ever took a "wrongful act" to convert Plaintiffs' investments or otherwise "dispossessed" Plaintiffs of their investments. To allege a "wrongful act," Plaintiffs must point to some "affirmative act[s] taken] to deprive another of property, not lack of action." *Spates v. Dameron Hosp. Ass'n*, 114 Cal.App.4th 208, 222 (2003) (emphasis added). , LeFever is not alleged to have affirmatively participated in any taking or misappropriation of Plaintiffs' investments. *See* Argument, *supra* I. A–C.⁵

such theory fails because the Complaint does not allege facts indicating why LeFever's conduct was not supported by the valid exercise of business judgment. There is a "presumption that directors' decisions are based on sound business judgment" and courts may not "interfer[e] in business decisions made by the directors in good faith and in the absence of a conflict of interest." *Berg & Berg Enters., LLC v. Boyle*, 178 Cal.App.4th 1020, 1045 (2009); see Cal. Corp. Code § 309 (a) & (c) (individual directors are immunized if acting in good faith and in ordinary prudence for the benefit of the company). To overcome this rule, "conclusory allegations of improper motives or conflict of interest are insufficient" and a plaintiff must affirmatively allege "fraud, bad faith, overreaching or an unreasonable failure to investigate material facts . . ." *1st Valley Credit Union v. Bland*, No. CV 10-1597-GW (MANx), 2010 WL 8757250, at *4 (C.D. Cal. Dec. 20, 2010). Plaintiffs have failed to do so here.

⁵ Alternatively, Plaintiffs do not assert that LM or LeFever were contractually obligated to return

IV. The Complaint fails to allege an elder abuse claim against LeFever (Claim Six).

Plaintiffs' elder-abuse claim should be dismissed because the Complaint fails to allege facts showing that LeFever engaged in any actions to mislead or abuse an elder Plaintiff. A financial-elder-abuse claim arises pursuant to California Welfare and Institutions Code § 15610.30 when (1) a person or entity "takes, secretes, appropriates, obtains, or retains real or personal property of an elder for a wrongful use or with intent to defraud, or both"; (2) "assists in" the aforementioned conduct "for a wrongful use or with intent to defraud, or both"; or (3) commits either of the above actions "by undue influence." Cal. Welf. & Inst. Code § 15610.30(a)(1)–(3) (cleaned up).

The elder-abuse claim fails out of the gate because the Complaint does not allege that any Plaintiff was an "elder" under the Welfare and Institutions Code. An elder is "any person residing in **this state**, 65 years of age or older." Cal. Welf. & Inst. Code § 15610.27 (emphasis added). But Plaintiffs plead that "at all relevant times" they resided in Virginia, Colorado, Arizona, Alaska, but *not* California. Compl. ¶¶ 7-12. Further "to bring a claim for elder abuse, the plaintiff must have been sixty-five when the alleged financial abuse occurred." *Moran v. Bromma*, 675 F. App'x 641, 646 (9th Cir. 2017) (dismissing elder-abuse claim because plaintiff was not 65 until after the alleged abuse occurred). But all Plaintiffs were allegedly under the age of 65 when they invested:

TABLE 2

Plaintiff	Age When Complaint Was Filed	Approximate Age When They Allegedly First Invested
Claridge	58 (Compl. ¶ 8)	50 (<i>Id.</i> ¶ 96 – invested in September 2016)
Winser	68 (<i>Id.</i> ¶ 9)	52 (<i>Id.</i> ¶ 103 – invested in 2008)
Micheros	65 (<i>Id.</i> ¶ 10)	49 (<i>Id.</i> ¶ 103 – invested in 2008)

monies invested in the LM-affiliates after Mattson was ousted. Nor could they, as such a claim would undermine their conversion theory. *See Formic Ventures LLC v. SomaLogic, Inc.*, No. 23-CV-02660-VC, 2023 WL 6037899, at *2 (N.D. Cal. Sept. 15, 2023) (conversion claims must be based on an independent duty separate from contract not to maintain possession of funds).

Sample	70 (<i>Id.</i> ¶ 11)	63 (<i>Id.</i> ¶ 111 – invested in 2017)
Walkers	68 (<i>Id.</i> ¶ 12)	51 (<i>Id.</i> ¶ 117 – invested in 2007)

Further, even if the Plaintiffs were “elders” under the Welfare and Institutions Code, the Complaint impermissibly group pleads the elder-abuse claim, asserting that the “Defendants” collectively took property “for a wrongful use,” “by undue influence” and with an “intent to defraud.” *See, e.g.*, Compl. ¶ 168. As with a fraud claim, a financial-abuse plaintiff cannot “lump[] Defendants together in a conclusory fashion.” *Bortz v. JP Morgan Chase Bank, N.A.*, No. 21-CV-618 TWR (DEB), 2022 WL 1489832, at *4 (S.D. Cal. May 10, 2022) (dismissing Cal. Welf. & Inst. Code § 15610.30 claim because plaintiffs failed to plead elements “with particularity”).!

V. The Complaint fails to allege that LeFever committed securities fraud in violation of Corporations Code § 25401 (Claim 10).

Plaintiffs’ California Corporations Code § 25401 claim must be dismissed because the Complaint fails to allege that LeFever was engaged in the fraudulent sale of any securities. Section 25401 of California’s Corporate Code makes it “unlawful for any person to offer or sell a security . . . by means of any written or oral communication that includes an untrue statement of a material fact” or a material omission. Plaintiffs’ Section 25401 claim fails because LeFever did not sell those investments to the Plaintiffs; and (b) LeFever did not know about Mattson’s fraudulent scheme.

Privity: Even if the LP and LLC interests were securities, Plaintiffs do not allege that LeFever sold any investment interests to Plaintiffs or that he made any misleading “written or oral communication[s]” in connection with any such sale. Cal. Corp. Code § 25401. Section 25401 requires a showing of “strict privity” between the alleged seller and the defendant. *Alameda v. Nuveen Mun. High Income Opportunity Fund*, No. C 08-3137 SI, 2009 WL 1424529, at *11 (N.D. Cal. May 20, 2009). In a private action under Section 25401, only the person who “sells a security to” the plaintiff is liable. Cal. Corp. Code § 25501. For example, an investment banker may have some role in raising money for a security and soliciting potential investors. But ultimately, that

broker is not liable under section 25401 if it was not the seller of the security at issue. *See Apollo*, 158 Cal.App.4th at 253–54 (affirming dismissal of section 25401 claim against broker-dealer for failing to allege privity).

Knowledge: The Complaint fails to allege that LeFever *knew* of any misrepresentation at the time it was made. As with Plaintiffs’ fraud claim, allegations of knowledge must be “plausible” and non-conclusory *Ablaza*, 2022 WL 19517298, at *5. A private plaintiff advancing a Section 25401 claim must show that the offeror of a security “was aware, or with reasonable care would have been aware, that statements by which the sale was made were false or misleading.” *People v. Simon*, 9 Cal.4th 493, 516 (1995). The Complaint fails to plead facts supporting such an allegation against LeFever.

VI. The Complaint fails to allege that LeFever violated the UCL (Claim Eight).

Plaintiffs’ UCL claim should be dismissed because the Complaint does not alleged facts showing LeFever engaged in any unlawful or unfair conduct. The UCL claim group pleads that “Defendants” engaged in “an ongoing course of unlawful or unfair business acts and practices[.]” Compl. ¶ 177. There are no allegations specific to LeFever that explain what he did that was unlawful or unfair.

Unlawful: The “unlawful” prong “borrows violations of other laws and treats [them] as unlawful practices independently actionable under [the UCL] and subject to the distinct remedies provided thereunder.” *Nacarino v. Chobani, LLC*, 668 F. Supp. 3d 881, 891 (N.D. Cal. 2022) (citations and ellipses omitted). The Complaint does not plead with any degree of specificity the underlying violations of law that LeFever supposedly committed. Compl. ¶ 177. That is fatal because a “UCL claim must be dismissed if the plaintiff has not stated a claim for the predicate acts upon which he bases the claim.” *Pellerin v. Honeywell Int’l, Inc.*, 877 F. Supp. 2d 983, 992 (S.D. Cal. 2012).

If Plaintiffs’ “unlawful” claim is merely based on fraud and other related causes of action in the complaint, that claim should also be dismissed because those underlying causes of action fail for the reasons discussed above. *See* Argument, *supra* I. A–C; *Velazquez v. General Motors LLC*, No. 2:24-CV-01519-DAD-CSK, 2024 WL 3617486, at *7 (E.D. Cal. Aug. 1, 2024) (“[T]o

the extent plaintiff intends for his UCL claim to borrow from his insufficiently alleged fraud claims, his UCL claim under the ‘unlawful’ prong clearly fails.”).

Unfair: The unfair prong of the UCL prohibits a business practice that “‘violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits.’” *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1104 (N.D. Cal. 2017) (citation omitted). While courts have adopted different tests for what qualifies as “unfair” conduct, “[r]egardless of the test” if “the unfair business practices alleged under the unfair prong of the UCL overlap entirely with the business practices addressed in the fraudulent and unlawful prongs of the UCL, the unfair prong of the UCL cannot survive if the claims under the other two prongs of the UCL do not survive.” *Id.* at 1104–05. That is the case here. The unfair business practices alleged—Mattson’s fraud—are the very same business practices alleged to violate the unlawful prong of the UCL. Because Plaintiffs’ claim against LeFever under the unlawful prong of the UCL fails, so too does Plaintiffs’ claim under the unfair prong. *Id.*

VII. Plaintiffs cannot seek a constructive trust against LeFever (Claim Four).

Constructive trust is a remedy, not a standalone cause of action. A constructive trust is “created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner.” *Campbell v. Superior Court*, 132 Cal.App.4th 904, 920 (2005). While a constructive trust can be “a form of relief for one or more of its substantive claims” it is “not an independent cause of action.” *A.B. Concrete Coating Inc. v. Wells Fargo Bank, Nat’l Ass’n*, 491 F. Supp. 3d 727, 736 (E.D. Cal. 2020) (dismissing claim of constructive trust without leave to amend); *Stansfield v. Starkey*, 220 Cal.App.3d 59, 76 (1990) (“In their third amended complaint appellants alleged, as causes of action, a resulting trust and a constructive trust. But neither is a cause of action only a remedy.”) (citations omitted). On this ground alone, the Court should dismiss this cause of action.

Even if constructive trust could be maintained as a cause of action – and it cannot – Plaintiffs have not alleged that LeFever possesses *any* of Plaintiffs’ investment monies. A “constructive trust may be imposed where there is “(1) the existence of a res (property or some

1 interest in property); (2) the right of a complaining party to that res; and (3) some wrongful
2 acquisition or detention of the res by another party who is not entitled to it.” *A.B. Concrete*, 491
3 F. Supp. 3d at 736 (citation omitted). There is no allegation that LeFever “wrongfully acquired” or
4 has possession of any of Plaintiffs’ monies.

5 **VIII. The Complaint fails to state a claim for an accounting against LeFever or for the**
6 **associated appointment of a receiver (Claim Nine).**

7 Typically, “[t]he appropriate place to seek an accounting is in the prayer for relief,” not as
8 a cause of action. *Haddock v. Countrywide Bank, N.A.*, No. CV 14-6452 PSG (FFMx), 2014 WL
9 12597043, at *4 (C.D. Cal. Dec. 22, 2014). Only in “rare cases” can “accounting can be a cause of
10 action.” *Id.* That “rare case” is “when a defendant has a fiduciary duty to a plaintiff which requires
11 an accounting” and “that some balance is due to the plaintiff that can only be ascertained by an
12 accounting.” *Id.* (cleaned up).

13 At the outset, the accounting claim fails because Plaintiffs have not alleged that LeFever
14 possesses any of Plaintiffs’ monies. *See, e.g., Haddock*, 2014 WL 12597043, at *4 (dismissing
15 accounting claim for failing to allege that the defendant was actually in possession of the
16 plaintiff’s money or property); *George v. New Century Mortg. Corp.*, No. CV 10–3928 HRL,
17 2010 WL 4056014, at *4 (N.D. Cal. Oct. 14, 2010 (“Absent a claim that [plaintiff] is due monies
18 from defendants, she has no right to an accounting.”)).

19 Separately, Plaintiffs have failed to allege that any investment monies at issue could not be
20 calculated based on a legal remedy. An accounting is only appropriate if “the accounts are so
21 complicated that an ordinary legal action demanding a fixed sum is impracticable.” *Civic W. Corp.*
22 *v. Zila Indus., Inc.*, 66 Cal.App.3d 1, 14 (1977) (citations omitted). Here, Plaintiffs allege no facts
23 to suggest that an accounting would be necessary to determine their damages claim.

24 Plaintiffs also cannot request the appointment of a receiver over LeFever. But there are no
25 allegations that he possesses or controls any of their money, so their request for a receivership
26 makes no sense.

27 **IX. Plaintiffs cannot state a claim for unjust enrichment against LeFever (Claim Seven).**

28 “[I]n California there is no standalone cause of action for unjust enrichment.” *Allen v.*

1 *ConAgra Foods, Inc.*, No. 13-CV-01279-JST, 2013 WL 4737421, at *11 (N.D. Cal. Sept. 3,
2 2013). “Rather, unjust enrichment is a basis for obtaining restitution based on quasi-contract or
3 imposition of a constructive trust.” *Id.* (citation omitted). As such, most federal courts have
4 dismissed causes of actions for unjust enrichment “so long as another cause of action is available
5 that permits restitutionary damages.” *Hoffman v. Tarnol*, No. CV 15-05755 SJO (AJWx), 2015
6 WL 13919455, at *3 (C.D. Cal. Oct. 7, 2015). On this basis alone, the Court may dismiss the
7 unjust enrichment claim against LeFever.

8 Even if Plaintiffs could maintain a separate claim for unjust enrichment, they have not
9 alleged that LeFever was unjustly enriched. “The equitable doctrine of unjust enrichment ‘is based
10 on the idea that ‘one person should not be permitted unjustly to enrich himself at the expense of
11 another’” *City of Oakland v. Oakland Raiders*, 83 Cal.App.5th 458, 478 (2022) (citations
12 omitted). Plaintiffs have failed to allege any facts showing that LeFever was unjustly enriched at
13 Plaintiffs’ expense. *See* Argument, *supra* I. A–C.⁶

14 **X. The Complaint fails to state a claim for declaratory relief against LeFever (Claim**
15 **Five).**

16 Plaintiffs’ declaratory judgment claim must be dismissed as to LeFever because there is no
17 controversy giving rise to a need for declaratory relief. To obtain declaratory relief, there must be
18 an “actual controversy” with respect to the legal rights of parties. Cal. Code Civ. P. § 1060.
19 “Whether a case is founded upon an ‘actual controversy’ centers on whether the controversy is
20 justiciable.” *Stonehouse Homes LLC v. City of Sierra Madre*, 167 Cal.App.4th 531, 540 (2008).
21 Plaintiffs allege that a declaration is needed because Defendants contest the validity of certain
22 investments and will “refuse to return” them. *See* Compl. ¶¶ 162–64. At best that states the
23 existence of a dispute between and among Plaintiffs, the LM-affiliated LPs and LLCs Plaintiffs
24

25 ⁶ LeFever’s conduct stands in stark contrast to Mattson’s. Unlike its assertions against LeFever,
26 the Complaint directly alleges that Mattson engaged in unlawful conduct to enrich himself. *See*,
27 *e.g.*, Compl. ¶¶ 46–47 (alleging that Mattson had a “strategy” of purchasing properties, closing
28 down the business to the detriment of local citizens, and holding onto it until the land value went
up); *id.* ¶85 (alleging that “Mattson had purchased property for his own personal use and then put
the property in his own name or that of KS Mattson Partners”).

1 claim to have invested in, and LM as the General Partner/Manger of those LPs and LLCs.

2 LeFever is not alleged to have any personal stake in that controversy. Plaintiffs do not
3 allege that LeFever possesses Plaintiffs' investment funds, or that he is the General Partner in any
4 of the LM-affiliated LPs and LLCs with the ability to recognize or deny Plaintiffs status as limited
5 partners or members or otherwise "refuse to return" Plaintiffs' investments. And further, to the
6 extent Plaintiffs claim that any "controversy" with LeFever is premised on the same theories
7 undergirding their other claims, that renders the declaratory relief claim duplicative of Plaintiffs'
8 other causes of action. Because those claims all fail, so does this one. *See O'M & Assocs., LLC v.*
9 *Ozanne*, No. 10CV2130 AJB (RBB), 2011 WL 4433645, at *4 (S.D. Cal. Sept. 21, 2011)
10 (dismissing declaratory judgment claim as duplicative).⁷

11 **LEFEVER JOINS MATTSON'S MOTION TO DISMISS.**

12 In addition to the reasons set forth above, the Complaint is also flawed for certain reasons
13 set forth in Mattson's September 16, 2024 Motion to Dismiss ("Mattson Motion"). *See* ECF No. 56.
14 Under Rule 12(g)(1), "[a] motion under this rule may be joined with any other motion allowed by
15 this rule." As a result, one party's "Rule 12 motions to be joined by other Rule 12 motions." *See*
16 *Austin v. Tesla, Inc.*, No. 20-CV-00800-EMC, 2021 WL 5921457, at *5 (N.D. Cal. Jan. 26, 2021)
17 (granting request to join another party's motion to dismiss).

18 Here, LeFever joins:

- 19 • Mattson's request to dismiss the Complaint because Plaintiffs lack standing
- 20 (Mattson Motion at 12–13);
- 21 • Mattson's request to dismiss the Complaint because it fails to join indispensable
- 22 parties (*id.* at 14–16); and

23
24
25
26 ⁷ Plaintiffs' request for a declaratory judgment may also be mooted by LM's petition for
27 bankruptcy. On September 12, 2024, LM filed its initial petition to the Bankruptcy Court. As part
28 of those proceedings, it is possible that evidence revealing the identities of any LP or member of
an LM-affiliated entity who has a cognizable, recoverable interest in their investment shares may
be disclosed.

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- Mattson’s request to dismiss the Complaint because Plaintiffs have failed to allege that the limited partnership interests are not “securities” under Corporate Code § 25019 (*id.* at 30–31).

LeFever requests that the Court dismiss the Complaint as to LeFever for the reasons set forth therein.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed as to LeFever.

DATED: September 19, 2024

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