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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

NASIR ABBAS DEEN,

Plaintiff and Appellant,

v.

VMK, INC.,

Defendant and Respondent.

H053576

(Santa Clara County

Super. Ct. No. 23CV410398)

Plaintiff Nasir Abbas Deen purchased an edible gummy from the Purple Lotus, a California licensed cannabis retailer operated by defendant VMK, Inc. After taking the gummy, plaintiff alleged that he suffered a panic attack followed by years of mental and physical health issues that he attributes to the effects of the gummy. Plaintiff sued defendant for intentional fraud and unfair competition, alleging defendant's salesperson gave him incorrect dosing instructions and falsely told him that the gummy would treat his anxiety without a "high." The trial court sustained a demurrer without leave to amend on the ground that plaintiff did not allege facts that the salesperson knowingly deceived him.

On appeal, Plaintiff argues the demurrer should not have been sustained because he stated valid claims for fraud and violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.; UCL). Plaintiff further contends that, even if his fraud allegations were determined to be deficient, the trial court should have permitted leave to

amend because he could have provided additional facts. We are not persuaded and will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the operative second amended complaint, plaintiff went to the Purple Lotus to buy cannabis that would alleviate his anxiety stemming from a dental procedure. He asked defendant's salesperson (E. Franco) for a quick, safe, and natural way to relieve his anxiety. He told Franco he had never used cannabis or any other recreational drug and did want to not get "high" or feel intoxicated. She recommended an edible gummy that contained 10mg of Delta-9-tetrahydrocannabinol (THC) and instructed him to take half of the gummy and to take the other half if he felt nothing after an hour. He later learned that THC is a Schedule 1 recreational antipsychotic substance that is known to cause intoxication and a "high" for up to 6 to 12 hours. He was not asked to sign a liability waiver that, according to plaintiff, defendant typically provided to first-time users to inform them of the risks of cannabis and THC.

After taking the gummy, plaintiff had a six-hour panic attack and went to the hospital emergency room for visual hallucinations, paranoia, anxiety, depression, dissociation, derealization, and depersonalization. In the following months and years, plaintiff reported experiencing continued anxiety, depression, sleeplessness, and migraines. He was involuntarily hospitalized after hearing voices and became concerned that he was suicidal. Plaintiff was later diagnosed with bipolar disorder, generalized anxiety disorder, and major depression. He continues to experience physical symptoms including ongoing migraines, ticks, tremors, muscle spasms, and a sharp pulsing sensation inside his brain.

A. SECOND AMENDED COMPLAINT

After plaintiff filed his original complaint, he moved to amend the complaint to add causes of action for medical malpractice, negligence, negligent misrepresentation, fraud, breach of the implied covenant and fair dealing, intentional infliction of emotional

distress, and unfair competition (Bus. & Prof. Code, § 17200 et seq.). The trial court requested additional briefing on the statute of limitations and allowed plaintiff to add only the fraud and unfair competition claims. Plaintiff filed the operative second amended complaint after his motion for reconsideration was denied.

B. DEFENDANT’S DEMURRER

Defendant filed a general and special demurrer, arguing that the entire second amended complaint and its two causes of action were uncertain and that plaintiff did not allege facts regarding the falsity and intent elements necessary to state claims for fraud and unfair competition. In opposition, Plaintiff asserted that Franco’s false statements were reckless and noted that complaints are liberally construed on demurrer.

The trial court sustained the demurrer without leave to amend. The court determined plaintiff’s factual allegations were not sufficient to show that Franco had intended to deceive him and at most stated a claim for negligence. The trial court compared the allegations that Franco had falsely represented the gummy would alleviate anxiety to a medical situation where complications arise from low probability inherent risks a physician did not disclose to a patient. The court explained that while plaintiff alleged that Franco had “told him it was her view the gummy would ease his anxiety[,] [t]he fact that Plaintiff’s anxiety actually increased does not lead to the inference that Franco knew the gummy would lead to increased anxiety at the time she told Plaintiff it would decrease his anxiety and intended to deceive Plaintiff into buying the gummy based on that representation. Instead, Plaintiff alleges Franco told him his anxiety would be reduced, Plaintiff suffered what might be described as a psychotic break an hour after taking the gummy, and Franco did not tell Plaintiff this was a result that could occur. Thus, at most, this is a case of negligent misrepresentation for which the statute of limitations ran by the time Plaintiff filed this lawsuit.” The trial court also found that the knowledge element of fraud was not satisfied by the conclusory statement that defendant

should have known from operating a cannabis dispensary that the representations were false.

Because plaintiff did not demonstrate how the operative complaint could be amended to state a valid claim for fraud, the trial court denied plaintiff's request for leave to amend. The written order states that when plaintiff was asked at the demurrer hearing¹ what additional facts could be alleged to overcome the pleading deficiencies, plaintiff did not articulate any new facts and insisted the second amended complaint was adequate.

Plaintiff later opposed defendant's proposed judgment of dismissal and requested reconsideration of the demurrer ruling based on purported new evidence and defendant's alleged litigation misconduct. Although Plaintiff prematurely appealed the order before judgment was entered, we deemed the appeal to be filed on the date of entry of judgment.²

II. DISCUSSION

A. STANDARD OF REVIEW

Our review of a judgment following an order sustaining a demurrer is de novo. (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031.) We independently review the complaint to determine whether it states facts sufficient to constitute a cause of action without being bound by the trial court's construction of the

¹ Plaintiff did not include a reporter's transcript of the hearing in the appellate record.

² Defendant moved to dismiss this appeal because plaintiff appealed from the order sustaining the demurrer rather than from the judgment. This court denied the motion to dismiss and on its own motion deemed plaintiff's premature appeal to be filed on the date of entry of judgment. The general rule is that an order sustaining a demurrer without leave to amend is not appealable, and an appeal is proper only after entry of a dismissal on such an order. (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1396.) However, "when the trial court has sustained a demurrer [without leave to amend] to all of the complaint's causes of action, appellate courts may deem the order to incorporate a judgment of dismissal, since all that is left to make the order appealable is the formality of the entry of a dismissal order or judgment." (*Ibid.*)

pleading and exercise our own judgment as to matters on which the trial court did not expressly rule. (*Miller v. Bakersfield News-Bulletin, Inc.* (1975) 44 Cal.App.3d 899, 901.) In undertaking this task, we assume the truth of the factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111 (*Fremont Indemnity Co.*)), but do not assume the truth of contentions, deductions, or conclusions of fact or law. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 (*Evans*).)

On appeal, we presume the trial court's order sustaining the demurrer is correct and " "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent." ' ' ' (*Pinto Lake MHP LLC v. County of Santa Cruz* (2020) 56 Cal.App.5th 1006, 1012.) Because "[i]t is the validity of the court's action in sustaining a demurrer, not its reasons, which is reviewable" (*Lee v. Bank of America* (1990) 218 Cal.App.3d 914, 919), we will affirm on any ground supported by the record. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.) "[A] plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).)

"When a demurrer is sustained without leave to amend, 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm.' [Citation.] Plaintiff has the burden to show a reasonable possibility the complaint can be amended to state a cause of action." (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1609 (*Hamilton*).)

"Where, however, amendment could not correct a deficiency in the complaint or where the action is barred as a matter of law, the demurrer is properly sustained without leave to amend." (*State of California Auto. Dismantlers Assn. v. Interinsurance Exchange* (1986) 180 Cal.App.3d 735, 742.) "The issue of leave to amend is always open on appeal, even

if not raised by the plaintiff.” (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746.)

B. PLAINTIFF DID NOT STATE A CLAIM FOR FRAUD³

A claim for “fraudulent deceit” requires a showing that the defendant acted “with intent to induce [a person] to alter his position to his injury or risk.” (Civ. Code, § 1709.)⁴ Intentional misrepresentation, defined as “[t]he suggestion, as a fact, of that which is not true, by one who does not believe it to be true” or “[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true,” is a type of deceit. (*Id.*, § 1710.) To plead fraud based on intentional misrepresentation, plaintiff was required to allege facts supporting the following elements: “ ‘(1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff’s reliance on the defendant’s representation was a substantial factor in causing that harm to the plaintiff.’ ” (*Lauckhart v. El Macero Homeowners Assn.* (2023) 92 Cal.App.5th 889, 903 (*Lauckhart*).)

³ We agree with defendant that plaintiff’s opening brief does not comply with the rule governing the content of appellate briefs because it contains no citations to the record. (California Rules of Court, rule 8.204(a)(1)(C).) Plaintiff is not exempt from this rule merely because he is self-represented. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246–1247.) Although we may deem all of plaintiff’s appellate contentions forfeited under these circumstances (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.), we proceed to consider the appeal on its merits.

⁴ Plaintiff cited Civil Code section 1572 in his opening brief as the statutory basis for his fraud claim. “However, that code section applies only to fraud ‘committed by a party to the *contract* ... with intent to deceive another party thereto, or to induce him to enter into the contract.’ ” (*Wilkins v. National Broadcasting Co.* (1999) 71 Cal.App.4th 1066, 1083–1084.) Since plaintiff does not allege there was a contract between himself and defendant, his reliance on Civil Code section 1572 is misplaced.

Each element of fraud must be pleaded with particularity. (*Lauckhart, supra*, 92 Cal.App.5th at p. 903; *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 211.) “General and conclusory allegations are inadequate.” (*Lauckhart*, at p. 903.) The policy to liberally construe pleadings does not apply; the plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) “‘[B]ecause allegations of fraud involve a serious attack on character, fairness requires that the defendant receive the fullest possible details of the charge to prepare a defense.’ [Citation.]” (*Lauckhart*, at pp. 903–904.)

1. The Complaint’s Allegations Do Not Establish Knowledge of Falsity

Reviewing the operative complaint, we see the principal issue on appeal as whether it contains the particular facts sufficient to satisfy the knowledge of falsity element of a fraud claim based on intentional misrepresentation.⁵ Plaintiff alleges that defendant made the following intentional misrepresentations: “that the ... cannabis medication prescribed to [plaintiff] was appropriate for his medical needs, that it would not get him high and that it would help him relax” and the “dosing instructions, telling him to take ‘half now’ and if nothing happens after an hour take the ‘other half.’ ” Plaintiff argues that Franco’s statements and instructions—“ ‘for anxiety take half now and half later’ ” and “ ‘it’s supposed to make you relax’ ”—constitute affirmative, specific, and material misrepresentations because they “conveyed false medical advice” to plaintiff “in response to his disclosed anxiety condition after his dental surgery.”

⁵ Plaintiff asserts that the trial court incorrectly treated Franco’s statements as nonactionable opinion. Although that was an argument defendant raised in support of its demurrer and now renews on appeal, the trial court expressly rejected it because defendant held itself out as possessing superior knowledge. We need not decide whether the statements are nonactionable opinions because we conclude that the complaint does not state facts sufficient to satisfy all of the elements necessary to state a fraud cause of action.

“The requisite state of mind, or scienter, for actual fraud or intentional misrepresentation is disbelief in the truth of the statement, i.e., *knowledge of falsity*.” (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1476 (*Anderson*); see also *Wishnick v. Frye* (1952) 111 Cal.App.2d 926, 931 [“the mere finding that a representation of fact is false without a finding of the presence of the requisite element of scienter cannot sustain the conclusion of fraud in an action for damages based on deceit”].) Also, false representations “ ‘made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.’ [Citation.]” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 (*Engalla*).) “What distinguishes actionable fraudulent deceit is the element of knowing intent to induce someone’s action to his or her detriment with false representations of fact. Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation.” (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 482.) “Where a defendant makes false statements, honestly believing them to be true, but without reasonable grounds for such belief, he may be held liable for negligent misrepresentation,” but not for fraud based on intentional misrepresentation. (*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 111 (*Roberts*); accord, *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252 [“Negligent misrepresentation does not require knowledge of falsity, unlike a cause of action for fraud”]; *Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.)

Anderson illustrates the distinction between intentional fraud and negligent misrepresentation with respect to the requirement of scienter. There, investors in limited partnerships sued an accounting firm for intentional and negligent misrepresentation after the partnerships failed. (*Anderson, supra*, 6 Cal.App.4th at pp. 1472–1473.) The firm had reviewed an offering memorandum provided to prospective investors containing

forecasted balance sheets based on the partnerships' tax returns and other financial statements. (*Ibid.*) Having done so, the firm represented that these documents constituted a reasonable basis for the forecasts and were completed according to accepted accountancy guidelines. (*Ibid.*) In their complaint, the investors alleged that these representations were untrue and that the firm failed to disclose that the partnerships would be required to secure significant debt to remain in business but that the necessary loans were unavailable. (*Id.* at p. 1473.)

The trial court granted summary judgment to the accounting firm, but the appellate court reversed as to the negligent misrepresentation claim only. (*Anderson, supra*, 6 Cal.App.4th at pp. 1476–1480.) Discussing intentional misrepresentation, the court held that the investors did not establish the element of scienter, explaining that even assuming the firm's representations about the forecasted balance sheets were untrue, there was no evidence that the firm made the representations knowing they were false or without believing them to be true. (*Id.* at p. 1476.) In the *Anderson* court's view, the investors raised only a question about whether the accounting firm "made representations about forecasts without first checking the facts upon which its representations were based, i.e., that it didn't do its homework. This constitutes a claim of negligent misrepresentation rather than an intent to deceive, which is the basis of actual fraud." (*Ibid.*)

Here, plaintiff alleges that "[d]efendants exhibited a reckless disregard for plaintiff's safety by allowing Franco to provide incorrect medical advice, knowing these representations to be false, and intending Plaintiff to rely on these representations" and that "[a]t the time that [Franco] made these representations to plaintiff, she knew that the representations were false and were made with a reckless disregard for the plaintiff's safety satisfying the intent to deceive element." He further alleges that defendant and Franco "should have also known that the information was false because they are a dispensary that dispenses products to those who want to get intoxicated from their

dispensary license, not a medical patient center that offers medication(products) to assist customers with various conditions as advertised on their website and continued to market their products are safely lab tested for therapeutic benefits to continue to deceive customers thinking THC has health properties when it really has risks and does not meet medical standards according to the FDA.”

These allegations do not establish, with requisite specificity, a knowledge of falsity or a reckless disregard for the truth on the parts of Franco or defendant. To begin with, the unadorned prefatory statements that defendant and Franco knew the representations were false and made the representations recklessly are inadequate because they are not pled with particularity and constitute conclusions of fact unentitled to an assumption of truth. (*Lauckhart, supra*, 92 Cal.App.5th at p. 903; *Evans, supra*, 38 Cal.4th at p. 6.) Indeed, there are no supporting facts in the complaint explaining *why* or *how* Franco or defendant would have known that the alleged representations regarding the cannabis gummy and its suitability to plaintiff’s medical needs and preferences were untrue. The allegation that the representations were made in “reckless disregard for the plaintiff’s safety” also does not suffice because it is reckless disregard for the truth, not the plaintiff, that matters for a claim based on intentional fraud. (*Engalla, supra*, 15 Cal.4th at p. 974.)

Moreover, the clarifying allegation—that defendant knew the statements were false because it operates a cannabis dispensary rather than a medical facility—does not assist plaintiff. The inference to be drawn from that allegation is that defendant, through Franco, made a healthcare recommendation without the requisite qualifications or training; in other words, that Franco was not a medical professional and had no reasonable grounds to make the recommendation. But as articulated in *Anderson*, while that type of allegation might form the basis of a negligent misrepresentation claim, it does not demonstrate that Franco made any of the representations about the gummy knowing

they were false or with a reckless disregard for the truth. (*Anderson, supra*, 6 Cal.App.4th at p. 1480; accord, *Roberts, supra*, 57 Cal.App.3d at p. 111.)

2. Knowledge of Falsity Is Not Established By Materials Outside the Complaint

Plaintiff argues the knowledge element of his fraud claim is established by two documents that he did not submit in opposition to the demurrer but has submitted to this court through a request for judicial notice: (1) a declaration from plaintiff's private investigator stating that Franco told him in a phone interview that defendant "didn't really train us"; and (2) "Matts contradictory deposition testimony under oath denying dosing instructions."⁶

We previously deferred ruling on plaintiff's judicial notice request for consideration with the appeal and now deny it. Plaintiff argues that the trial court should have considered the documents, which plaintiff provided only in connection with other motions and filings made in the trial court, as additional evidence that defendant and Franco knew the statements about the gummy were false, as a basis to amend his complaint, and as support for additional unasserted claims, such as constructive fraud. Plaintiff avers that the documents are the proper subject of judicial notice because he submitted them in the trial court and they are relevant to the issues on appeal.

We disagree. Courts use judicial notice as a tool to recognize and accept a fact " 'relevant to an issue in the action without requiring formal proof of the matter.' " (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) "A matter ordinarily is subject to judicial notice only if the matter is reasonably beyond dispute." (*Fremont Indemnity Co., supra*, 148 Cal.App.4th at p. 113.) "[W]e 'generally do not take judicial notice of evidence not presented to the trial court' and will do so only in 'exceptional circumstances.' " (*Ross v. Seyfarth Shaw*

⁶ We surmise plaintiff is referring to the deposition of defendant's CEO Mathew Krishnamachari.

LLP (2023) 96 Cal.App.5th 722, 746 (*Ross*).) Additionally, when determining whether a complaint pleads a viable cause of action, we may “ ‘consider evidence outside the pleadings which the trial court considered without objection. [Citation.]’ [Citation.]” (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1065; *Shuts v. Covenant Holdco LLC* (2012) 208 Cal.App.4th 609, 622, fn. 7.)

We have carefully reviewed the record and conclude that the trial court did not consider the documents attached to the judicial notice request because plaintiff did not provide them in opposition to the demurrer. Plaintiff’s primary argument against the demurrer was that the complaint adequately alleged all of the necessary facts required to state a fraud claim and he requested leave only to correct defects specified by the trial court. He neither discussed the documents he now seeks to have us notice nor did he represent to the trial court that he could amend the complaint to state an intentional fraud claim based on those documents. Despite his obligation to do so on appeal (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 287), Plaintiff cites no legal authority to support his implicit proposition that the trial court was obligated to sort through its docket to find documents submitted with different motions but not produced in connection with the matter under consideration when assessing whether leave to amend should be granted.

Furthermore, Plaintiff does not adequately explain why the documents are relevant to the species of fraud he alleged in the complaint. (*Ross, supra*, 96 Cal.App.5th 722 at pp. 745–746.) He seemingly argues that Krishnamachari’s deposition testimony and Franco’s statements to his private investigator prove knowledge of falsity because they contradict the alleged misrepresentations and Purple Lotus’ marketing and training materials, which he suggests describe the dispensary as a “patient center.” But plaintiff does not cite to specific deposition testimony that supports his argument. Nor are we persuaded that the documents, contradictory or otherwise, supply the critical facts missing from the complaint explaining why Franco knew her statements about the

gummy were false or that she acted with reckless disregard for the truth at the time she made the statements to plaintiff.

Plaintiff also seems to assert that knowledge of falsity can be inferred from evidence of defendant's litigation misconduct, but he does not support this contention with any cogent argument supported by applicable legal authority.⁷ Plaintiff cites a case that does not exist, *People v. Sokolow* (1993) 12 Cal.App.4th 347, which he contends stands for the principle that a party's litigation conduct can show " 'a consciousness of guilt, is reckless, and is highly probative of scienter.['] " Plaintiff also cites to *Engalla* and *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094 (*Oregel*)⁸ for the proposition that fraudulent intent may be inferred from circumstantial evidence such as patterns of misconduct and document falsification. But these citations are inapt; neither *Engalla* nor *Oregel* endorsed the premise that a defendant's conduct during ensuing litigation can support a reasonable inference that it knew, on a date preceding the filing of

⁷ Plaintiff faults the trial court for not considering purported evidence of defendant's misconduct in sustaining the demurrer and asserts that the court failed to address evidence in his previous reconsideration motion showing that defendant had intentionally falsified and fabricated employee training documents. He cites a document which we understand to be plaintiff's own declaration in support of a motion for reconsideration of the order denying leave to amend the first amended complaint. We cannot assess plaintiff's contention because the appellate record does not contain a reporter's transcript or settled statement indicating what occurred at the hearing on the reconsideration motion or the trial court's reasons for denying it.

In any event, the record shows that plaintiff raised the allegation of defendant's misconduct again in a written opposition to the proposed judgment of dismissal, which plaintiff filed *after* the order sustaining the demurrer and in which he implies that reconsideration of that order should be granted. We deem the entry of judgment as the trial court's denial by implication of plaintiff's contention that the documents would have altered the outcome of the demurrer. (See *Safeco Ins. Co. v. Architectural Facades Unlimited, Inc.* (2005) 134 Cal.App.4th 1477, 1483 ["[T]he trial court should not enter judgment while a timely motion for reconsideration is pending, unless by so entering a judgment the court intends to deny the motion for reconsideration by implication."].)

⁸ Notably, the citation for *Oregel* that plaintiff included in his opening and reply appellate briefs is incorrect. We have used the correct citation in this opinion.

a complaint, that its statements about particular topics were false for the purpose of establishing the scienter element of a claim for intentional fraud.

Nonetheless, we have reviewed the documents that plaintiff contends show “incidents of intentional deception such as employee write-ups reporting fraudulent product representations” and “a pattern of deliberate misconduct and corporate recklessness.” We believe plaintiff is referring to an exhibit attached to his request for judicial notice which purportedly contains 22 “documented incidents [that] show reckless intent to deceive in Franco’s write-ups for failing to follow proper safety procedures ... [and] [s]hows a consistent pattern of recklessness and intent to mislead.” Those documents are disciplinary records documenting Franco’s dismissal for her “poor work performance, poor attendance,” failing to wear a mask during the pandemic, talking on her cell phone, and for needing “to be asked to stay busy instead of standing around talking.” None refer to instances in which Franco, either intentionally or unintentionally, gave incorrect information to customers regarding the anticipated effects or dosage of cannabis products. Accordingly, the documents are not relevant to the issue of whether Franco or defendant knowingly deceived plaintiff.

On this record, we conclude that plaintiff has not alleged the particular facts needed to plead the scienter element of intentional misrepresentation. (*Lauckhart, supra*, 92 Cal.App.5th at p. 903.) Therefore, the trial court did not err in sustaining the demurrer to the fraud cause of action.

C. PLAINTIFF DID NOT STATE A UCL CLAIM

“ ‘The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as “any unlawful, unfair or fraudulent business act or practice.” [Citation.] Its purpose “is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.” ’ [Citation.]” (*Beverage v. Apple, Inc.* (2024) 101 Cal.App.5th 736, 747.) Plaintiff clarifies that his UCL claim arises under the fraudulent prong of the statute because it is “predicated entirely on the fraud allegations.”

To state a claim under the fraudulent prong, a plaintiff must allege facts showing that members of the public are likely to be deceived by the defendant's conduct. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951; *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, 1254.)

Plaintiff argues that his UCL claim "requires reversal" because he "alleges a plausible fraud claim." But we have determined that the complaint does not plead all of the elements necessary to state a cause of action for intentional fraud with sufficient particularity based on the misrepresentations alleged in the complaint and plaintiff fails to identify any other allegations from his pleading that could viably support a UCL claim against defendant for fraudulent business practices. It is not enough that plaintiff now believes that defendant fabricated training documents and falsely asserted the existence of safety protocols; plaintiff would also have to allege that he relied on those practices. (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 614.) But plaintiff admits he only discovered this conduct through discovery after initiating this case. Accordingly, we also hold that plaintiff failed to state a UCL claim. (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474 [plaintiff fails to state a UCL claim for lack of particularity if based on same allegations from deficiently pleaded fraud claim].)

D. NO ERROR IN DENYING LEAVE TO AMEND

We review the denial of leave to amend for abuse of discretion. (*Holland v. Jones* (2012) 210 Cal.App.4th 378, 381.) As we have noted, it is plaintiff's burden to demonstrate a reasonable possibility that the defects in the complaint can be cured by amendment. (*Hamilton, supra*, 195 Cal.App.4th at p. 1609.) "The assertion of an abstract right to amend does not satisfy this burden." (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.) "The plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action." (*Ibid.*)

Plaintiff's principal argument concerning leave to amend is that the trial court did not independently consider the documents he submitted to this court in his request for judicial notice. Plaintiff broadly asserts that the evidence contained in those documents supports amending the complaint to add several causes of action and expanded allegations of fraud, perjury, document fabrication and obstruction of justice. However, plaintiff primarily focuses on a proposed claim for constructive fraud.

Plaintiff has not carried his burden of showing a reasonable possibility that amendment can cure the complaint's defects. As explained *ante*, plaintiff does not persuasively explain how the documents remedy the fraud claim by establishing that Franco or defendant knew the alleged misrepresentations about the gummy were false. With respect to constructive fraud, plaintiff has not set forth the applicable substantive law or identified any purported facts establishing that he and defendant had a fiduciary or confidential relationship, which is a required element. (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131; *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562 [“ ‘Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship’ ”].) Thus, we conclude the trial court did not abuse its discretion by refusing to allow plaintiff to amend the complaint.

III. DISPOSITION

The judgment is affirmed. As the prevailing party on appeal, defendant is entitled to its appellate costs. (Cal. Rules of Court, rule 8.278(a).)

Adams, J.

WE CONCUR:

Greenwood, P. J.

Lie, J.

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