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(SPACE BELOW FOR FILING STAMP ONLY)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

BEN JEWELRY, INC., a California Corporation, d/b/a South Beverly-Wilshire Jewelry & Loan, d/b/a The Dina Collection, and YOSSI DINA, an individual,

Plaintiffs,

vs.

DICKSTEIN SHAPIRO, LLP, a limited liability partnership, JAMES H. TURKEN, CHANDA R. HINMAN, and DOES 1 through 100, inclusive,

Defendants.

AND RELATED CROSS-ACTION(S).

CASE NO. BC501758
[Assigned for All Purposes to the Honorable Debre Katz Weintraub, Dept. 47]

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT/SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES

[Filed Concurrently with the Declaration of Alan Van Gelder and Exhibits, the Declaration of Keith Zimmet and Exhibit, Declaration of Shlomo Barash and Exhibit, the Declaration of Yossi Dina, Plaintiffs' Separate Statement of Material Disputed Facts, Plaintiffs' Response to Defendant's Separate Statement of Undisputed Facts, Plaintiffs' Objections to Evidence Submitted by Defendant]

Date : August 25, 2014
Time : 8:30 a.m.
Dept. : 47

Complaint Filed: February 26, 2013
1st Amended Complaint: March 20, 2013
Trial Date: October 7, 2014

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TO THE COURT AND ALL PARTIES:

Plaintiffs BEN JEWELRY, INC. and YOSSI DINA (hereinafter collectively referred to as BJI) submit the following Opposition to Defendant's Motion for Summary Judgment/Adjudication on the following grounds:

1. Pursuant to California *Code of Civil Procedure* §340.6(a)(1), the one year statute of limitations for legal malpractice is tolled until the plaintiff suffers an actual actionable injury. In this case BJI filed the case against Defendant within one year of suffering actual actionable injury.

2. In 2010 BJI and Edenhurst Gallery agreed to settle a lawsuit filed by Edenhurst against BJI. As part of that settlement, BJI and Edenhurst agreed that BJI owned a group of paintings. (Hereinafter referred to as the Subject Paintings.) Defendant represented BJI and was tasked by BJI to negotiate and draft a settlement agreement that affirmed BJI's ownership of the Subject Paintings and protected BJI's ownership of the Subject Paintings in the event that Edenhurst later filed for bankruptcy. Ultimately in July of 2010, Edenhurst and BJI signed a settlement agreement that affirmed BJI's ownership of the Subject Paintings and contained provisions that purportedly protected BJI's ownership of the paintings in the event of a subsequent bankruptcy.

3. Although BJI and Edenhurst had agreed that BJI owned the Subject Paintings, as a result of the malpractice of the Defendant, the Settlement Agreement did not adequately protect BJI's ownership of the Subject Paintings in the event that Edenhurst filed for bankruptcy. In 2012 Edenhurst filed for bankruptcy. BJI turned to the Settlement Agreement to protect its ownership of the Subject Paintings. However, due to Defendant's failure to properly draft the Settlement Agreement, the Bankruptcy Court determined that the Settlement Agreement did not protect BJI's ownership of the Subject Paintings.

4. Edenhurst did not file for bankruptcy until May 7, 2012. The Bankruptcy Court did not determine that the Settlement Agreement failed to adequately protect BJI's ownership of the Subject Paintings until September 18, 2012. BJI filed the legal malpractice case on February 26, 2013, well within one year of either date.

5. "If the existence or effect of a professional's error depends on a litigated or negotiated determination's outcome ... actual injury occurs only when that determination is made." *Baltins v.*

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James (1995) 36 Cal.App.4th 1193, 1195. "Thus, if the propriety of an attorney's acts or advice is contingent on the outcome of a claim by or against the client, the client does not sustain actual injury until the claim is resolved adversely, which indicates both that the attorney erred and that the error caused harm." (*Id.* at 1203.) Prior to September 18, 2012 no determination had been made that Defendant's conduct constituted malpractice or that such malpractice had caused harm to BJI. Without a determination by the Bankruptcy Court that the Settlement Agreement failed to protect BJI's ownership of the Subject Paintings, BJI did not suffer harm as a result of the malpractice of Defendant. Prior to Edenhurst filing for bankruptcy on May 7, 2012 there was no causal connection between Defendant's malpractice and damage to BJI.

6. Under *Viner v. Sweet* (2003) 30 Cal.4th 1232 BJI does not need "an express concession" from Thomas DiGiammatteo in 2014 that Edenhurst agreed that BJI owned the Subject Paintings. BJI "need not prove causation with absolute certainty." Rather, BJI can simply "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Viner* supra at 1242-43.

7. In this case there is ample evidence that in 2010 Edenhurst agreed that BJI owned the Subject Paintings and that Edenhurst agreed that BJI's ownership should be protected in the event of an Edenhurst bankruptcy filing. For example, the April 29, 2010 Term Sheet prepared and signed by Edenhurst is evidence of this agreement. The July 15, 2010 Settlement Agreement signed by Edenhurst is evidence of this agreement. The testimony of Yossi Dina regarding his negotiations with Edenhurst is evidence of this agreement.

8. Triable issues of material disputed fact exist with respect to Defendant's fraud and conscious disregard of the rights of the BJI. Evidence exists which demonstrates that Defendant intentionally mislead BJI into signing the settlement agreement with Edenhurst. BJI is entitled to seek punitive damage and breach of fiduciary duty claims against the Defendant.

9. The Settlement Agreement in July 2010 stated that both Yossi Dina and BJI owned the Subject Paintings. Therefore, Defendant's malpractice harmed both Dina and BJI. Furthermore, Defendant has not met its initial burden with respect to Dina's injury claims.

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BJI's Opposition is based on the attached Memorandum of Points and Authorities, the Declaration of Alan Van Gelder and Exhibits, the Declaration of Keith Zimmet and Exhibit, the Declaration of Shlomo Barash and Exhibit, the Declaration of Yossi Dina, Plaintiffs' Separate Statement of Material Disputed Facts (hereinafter referred to as DF), Plaintiffs' Response to Defendant's Separate Statement of Undisputed Material Facts, Plaintiffs' Objections to Defendant's Evidence Submitted in Support of Summary Judgment/Adjudication, all pleadings on file in this matter, and all facts and arguments presented at hearing on this matter.

DATED: August 11, 2014

GREENE BROILLET & WHEELER, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

The malpractice committed by Defendant Dickstein Shapiro LLP (through its attorneys James Turken and Chanda Hinman) is clear. Defendant was tasked with negotiating, drafting, and approving the language of a settlement agreement between BJI and Edenhurst Gallery. (Hereinafter referred to as the Settlement Agreement). (DF 2) BJI needed Defendant to prepare and approve a settlement agreement that adequately protected BJI's ownership of the Subject Paintings. (DF 3) It was necessary for BJI to protect its ownership of the Subject Paintings in the even that at some unknown point in the future, Edenhurst filed for bankruptcy. BJI needed the Settlement Agreement to keep any bankruptcy filing by Edenhurst from interfering with BJI's ownership of the Subject Paintings. (DF 4-6)

The Settlement Agreement was signed on July 15, 2010. (DF 7) Edenhurst filed for bankruptcy on May 7, 2012. (DF 8) Shortly after filing bankruptcy, Edenhurst tried to use the bankruptcy to deprive BJI of its ownership of the Subject Paintings. (DF9) BJI fought the attempt by arguing that the Settlement Agreement protected the Subject Paintings from the bankruptcy. (DF 10) A hearing was held on September 18, 2012 in the Bankruptcy Court. During the hearing the Bankruptcy Judge expressed confusion regarding the language of the Settlement Agreement. (DF 11) If Defendant had not breached the standard of care and had Defendant properly drafted the Settlement Agreement there would not have been any confusion regarding the nature of the Agreement. (DF 11-12) Unfortunately, because Defendant was negligent in drafting the Settlement Agreement the Bankruptcy Court was left to decide between two competing arguments from BJI and Edenhurst. (DF 12) The hearing lasted for several hours. Eventually the Bankruptcy Court ruled that the Settlement Agreement was ambiguously drafted and that the Settlement Agreement did not adequately protect BJI's ownership of the Subject Paintings in the event of Edenhurst's bankruptcy. (DF 13)

Without the protection of the Settlement Agreement, BJI lost its ownership of the Subject Paintings to the Edenhurst Bankruptcy Estate. (DF 14) The Subject Paintings were worth millions of dollars based upon appraisals commission by all parties to the bankruptcy. (DF 15)

Given that Defendant was responsible for drafting and approving the language of the Settlement Agreement that failed to adequately protect BJI's ownership of the Subject Paintings in the event of an Edenhurst bankruptcy, BJI sued Defendant for legal malpractice on February 26, 2013. (DF 16)

A seat belt is designed to keep a driver from being ejected from a vehicle in the event the vehicle crashes. A defectively designed seatbelt does not actually cause harm to a driver UNTIL the automobile crashes AND the seatbelt fails to prevent the driver from being ejected from the vehicle. Until the driver is ejected from the vehicle there is no actual damage to the driver caused by the defective seat belt. The defective seatbelt may have been manufactured seven years before the crash. It does not matter. The defective seatbelt does not actually cause injury until there is a crash and the seatbelt fails to do its job and protect the driver from being ejected from the vehicle.

In this case, the Edenhurst bankruptcy filing is the crash. The Settlement Agreement is the defectively designed seatbelt. The Bankruptcy Court's September 18, 2012 ruling is the moment the defective seatbelt failed to protect the driver from being ejected from the vehicle. BJI's malpractice action is timely. Although the Settlement Agreement was drafted in 2010, due to the malpractice of Defendant, the Agreement actually damaged BJI in 2012. Defendant's motion should be denied in its entirety.

II. STANDARD OF LAW.

Summary judgment is only appropriate when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (*Code Civ. Proc.* § 437c, subd. (c); *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 741.) The moving party bears the burden of establishing, by declarations and evidence, a complete defense to plaintiff's action or the absence of an essential element of plaintiff's case. (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1543-1544.) The moving party must demonstrate that *under no hypothesis* is there a material factual issue requiring a trial. (*Ibid.* (emphasis added).)

"Because a summary judgment denies the adverse party a trial, it should be granted with caution. [Citation.] Declarations of the moving party are *strictly construed*, those of the opposing party are *liberally construed*, and *doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party*. The court focuses on the issue finding; it does not

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resolve issues of fact. The court seeks to find contradictions in the evidence, or in inferences reasonably deducible from the evidence, which raise a triable issue of material fact. [Citation.]" (*Oliver v. County of Los Angeles* (1998) 66 Cal.App.4th 1397, 1403 (emphasis added).)

III. EDENHURST AGREED THAT BJI OWNED THE SUBEJCT PAINTINGS.

Defendant cites *Viner v. Sweet* (2003) 30 Cal.4th 1232 for the argument that BJI must show that but for Defendant's malpractice, BJI would have obtained a better result. Defendant argues that BJI cannot show a better result because of the deposition testimony of Thomas DiGiammatteo. In 2014 Mr. DiGiammatteo testified that Edenhurst would never enter into any agreement that gave BJI ownership of the Subject Paintings. Defendant argues that it does not matter how badly it drafted the Settlement Agreement in 2010. Defendant claims that under *Viner*, BJI cannot prevail without favorable testimony from DiGiammatteo in 2014.

Viner is clear that Defendant does not prevail in a malpractice case by simply producing testimony from a former adversary to BJI from the original transaction. The Court held:

> In both litigation and transactional malpractice cases, the crucial causation inquiry is what would have happened if the defendant attorney had not been negligent. This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative. (Citation omitted)
>
> The Viners also contend that the "but for" test of causation should not apply to transactional malpractice cases because it is too difficult to obtain the evidence needed to satisfy this standard of proof. In particular, they argue that proving causation under the "but for" test **would require them to obtain the testimony of the other parties to the transaction, who have since become their adversaries,** to the effect that they would have given the Viners more favorable terms had the Viners' attorneys not performed negligently. **Not so.** In transactional malpractice cases, as in other cases, the plaintiff may use circumstantial evidence to satisfy his or her burden. **An express concession by the other parties to the negotiation that they would have accepted other or additional terms is not necessary. And the plaintiff need not prove causation with absolute certainty. Rather, the plaintiff need only " 'introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.' "** (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205, quoting Prosser & Keeton on Torts (5th ed. 1984) § 41, p. 269, fns. omitted.) (Emphasis added) *Viner* supra at 1242-43).

Plaintiff is not required to obtain favorable testimony from Mr. DiGiammatteo in 2014 to show what Edenhurst agreed to in 2010. The evidence is clear that in 2010 Edenhurst actually agreed that BJI owned the Subject Paintings and that BJI's ownership interest should be protected in the event of an Edenhurst Bankruptcy. (DF 18-19) The July 15, 2010 Settlement Agreement signed by Edenhurst and BJI is evidence that Edenhurst had agreed that BJI owned the Subject

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Paintings. (DF 18) The April 29, 2010 Term Sheet signed by Edenhurst is evidence that Edenhurst had agreed that BJI owned the Subject Paintings. (DF 19) The Declaration of Yossi Dina attached to this Opposition, as well as his deposition testimony, is evidence that Edenhurst agreed that BJI owned the paintings.

A. Edenhurst's Desperate Financial Condition.

Edenhurst's precarious financial situation explains why Edenhurst agreed that BJI owned the Subject Paintings. Edenhurst's financial problems began in July of 2002, when two paintings on exhibit to its gallery were stolen. (DF 20) Edenhurst was not adequately insured and was forced into a settlement in which Edenhurst agreed to pay $2 million. The money was to be paid in installments. (DF 21) Edenhurst was unable to pay off the $2 million and it could not get a loan from a bank. Edenhurst was forced to turn to BJI. (DF 22) In order to get a loan from BJI, Edenhurst agreed to use paintings from its gallery as collateral. (DF 23) Between October of 2005 and January 2009, Edenhurst's financial troubles required it to take out nearly $4.5 million in loans from BJI. The Subject Paintings served as collateral for the loans. (DF 24)

In 2009 Edenhurst stopped paying off the loans. (DF 25) BJI foreclosed on the Subject Paintings and became the owner of the Subject Paintings. (DF 26) In October of 2009 Edenhurst sued BJI in Los Angeles Superior Court to prevent BJI from selling the paintings. (The State Court Action). (DF 27)

The State Court Action did not cure Edenhurst's financial problems. Edenhurst had fallen behind on paying back an $850,000 loan it owed a third-party creditor. Edenhurst needed an additional $850,000 to satisfy the creditor. (DF 28) Edenhurst couldn't get the money from any other source. In an act of complete desperation, Edenhurst turned to BJI. (DF 29) Even though Edenhurst was suing BJI, Edenhurst began reaching out to BJI to see if BJI would loan Edenhurst even more money. (DF 30) In a March 22, 2010 email written by Defendant attorney James Turken to Yossi Dina, Turken wrote, "Again, [Edenhurst has] to be desperate to come to you for a loan in light of the litigation. **I think that any additional loan you may make should be as part of, and contingent upon a final binding settlement.**" (DF 31).

B. A Phenomenal Deal.

Given Edenhurst's desperate financial condition and need for cash from BJI, it is not surprising that Edenhurst was ready, willing, and able to settle on terms that were favorable to BJI.

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The parties would ultimately settle on July 15, 2010. (DF 32) On August 2, 2010 Edenhurst obtained from BJI a new loan for $850,000. (DF 33)

As set out in Yossi Dina's declaration, Mr. Dina had always believed that BJI had validly foreclosed on the Subject Paintings and that BJI owned the Subject Paintings. (DF 34) Dina told Edenhurst he would not settle unless he had an agreement that BJI owned the Subject Paintings. (DF 35) Edenhurst agreed that BJI would own the Subject Paintings. (DF 36) In exchange, Edenhurst asked for the option to purchase the Subject Paintings from BJI and obtain new loans from BJI. (DF 37). Edenhurst prepared and signed a Term Sheet on April 29, 2010 that it told Dina outlined the terms of BJI's ownership of the Subject Paintings and Edenhurst's option to purchase the Subject Paintings. (DF 38).

Item 1 of the April 29, 2010 Term Sheet signed by Edenhurst states that Edenhurst has the ability to buy the Subject Paintings from BJI. (DF 39) Edenhurst could not agree to buy the Subject Paintings from BJI unless Edenhurst first agreed that BJI owned the Subject Paintings.

At the time Edenhurst signed the Term Sheet, Turken and Hinman told Dina that he had received a good deal from Edenhurst. (DF 40). Hinman testified that when she and Turken saw the Term Sheet, they felt that BJI had obtained a "phenomenal deal." (DF 41). Item 8 of the Term Sheet makes it easy to see why Edenhurst agreed to BJI's ownership of the paintings. Section 8 references Edenhurst's desperate desire to obtain **$2.5 million** in new loans from BJI. (DF 42)

C. The July 15, 2010 Settlement.

After receiving the Term Sheet from Edenhurst, Dina told Turken and Hinman that he wanted to make sure BJI was protected in any settlement. (DF 43) Dina told them that under any settlement agreement BJI had to own the Subject Paintings. (DF 44) Dina also specifically told them that he wanted to ensure that the written Settlement Agreement reflected BJI's ownership of the Subject Paintings and protected BJI's ownership of the Subject Paintings in case Edenhurst ever filed for bankruptcy. (DF 45). Dina trusted his lawyers to draft and approve the language of the Settlement Agreement. (DF 46) Turken and Hinman assured Dina that the Settlement Agreement would ensure that BJI owned the Subject Paintings and that BJI's ownership of the Subject Paintings would be protected in the event that Edenhurst filed for bankruptcy. (DF 47)

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Ultimately, contrary to the assurances of Defendant and contrary to the agreement between Edenhurst and BJI, the Settlement Agreement did not adequately protect BJI's ownership of the Subject Paintings in the event of an Edenhurst bankruptcy. While the Settlement Agreement was not properly drafted to protect BJI, language within the agreement does show that Edenhurst agreed that BJI owned the Subject Paintings. (DF 16, 19, 104-106)

In 2009 BJI had foreclosed on the Subject Paintings and claimed it owned the Subject Paintings. In 2009 Edenhurst brought the State Court Action claiming that BJI did not properly foreclose on the Subject Paintings. (DF 51) The Settlement Agreement required a desperate Edenhurst to dismiss with prejudice its lawsuit against BJI and waive any and all claims and arguments that BJI did not own the Subject Paintings. (DF 52) Section 7 and Section 8 of the Settlement Agreement confirm that Edenhurst was giving up any existing or potential claim/argument that BJI did not validly foreclose on the Subject Paintings and that BJI did not validly own the Subject Paintings. (DF 53)

Section 1 of the Settlement Agreement on Page 1 is entitled "Purchase of the Collateral Paintings." The section outlines a mechanism in which Edenhurst could purchase the Subject Paintings from BJI. (DF 56) Edenhurst could not agree to purchase the Subject Paintings from BJI unless Edenhurst had agreed that BJI already owned the Subject Paintings. (DF 104-106).

Subsection E of the Purchase Agreement reads, "[BJI] shall **retain all** right, title, interest, possession, custody, and control **of all Collateral Paintings,**" until Edenhurst is able to purchase the paintings under the terms of the Settlement Agreement. (DF 57) The phrase "All right, title, interest, possession, custody, and control" of the Subject Paintings is the equivalent of ownership of the Subject Paintings. There is no way that a person or entity can maintain ALL right, title, and interest in the Subject Paintings and not actually own the Subject Paintings. (DF 104-106). The provision does not state that BJI will potentially gain ownership of the Subject Paintings if Edenhurst does not perform under the terms of the Settlement Agreement. The provision reads that BJI actually keeps its ownership of the Subject Paintings, until and unless Edenhurst purchased the Subject Paintings from BJI within a certain period of time. Edenhurst had agreed that BJI currently had all right, title, and interest in the Subject Paintings, and KEEPS all right,

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title, and interest in the paintings. BJI cannot retain/keep ownership of something it does not already own. (DF 57-61, 104-106)

In 2014 Mr. DiGiammatteo was asked about the "shall retain all right, title, interest" language that Edenhurst agreed to in the Settlement Agreement. Mr. DiGiammatteo is a graduate of UCLA and majored in literature. (DF 58). It is safe to assume that Mr. DiGiammatteo is familiar with the English language. He testified that he understood the word retain to mean keep something that rightfully belongs to you. (DF 59). Mr. DiGiammatteo was then asked what he understood the word "retain" meant in the Settlement Agreement. Mr. DiGiammatteo suddenly claimed ignorance and claimed that he had never actually read the provision in the Settlement Agreement before signing it. (DF 60.). Mr. DiGiammatteo was then shown Section C of Paragraph 11 of the Settlement Agreement in which he represented and warranted that he and his attorneys had gone over the agreement and that he understood the terms of the Settlement Agreement he was signing. (DF 61)

Recognizing how badly the Settlement Agreement impeached him, DiGiammatteo offered an amazing excuse. Yes the Settlement Agreement was an agreement between Edenhurst and BJI that BJI owned the Subject Paintings, and yes DiGiammatteo signed the agreement, but in reality he was "coerced" into signing the Settlement Agreement **by his own attorneys!** (DF 62) According to DiGiammatteo, **Edenhurst's attorneys were in league with Yossi Dina**. (DF 62) According to DiGiammatteo any problems with the Settlement Agreement stem from coercion by his attorneys who had secretly switched their allegiance. (DF 62). How can Defendant claim Edenhurst would never agree that BJI owned the Subject Paintings when its "star witness" says that in 2010 he would have signed anything put in front of him by lawyers in league with Dina?

Section 4 of the Settlement Agreement refers to BJI's remedies in the event that Edenhurst defaults under the terms of the Agreement. Under Section 4(A)(c) a bankruptcy filing by Edenhurst constitutes a default. (DF 63) Under Section 4B of the Settlement Agreement Edenhurst agreed that in the event of a Edenhurst bankruptcy, Plaintiffs "**shall retain all right, title, and interest**" in the Subject Paintings that Edenhurst has not already purchased from Plaintiffs under Section 1 of the Agreement. Section 4(B) again repeats the "shall retain all right,

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title, and interest" language from Section 1, once again emphasizing that Edenhurst and BJI had agreed that BJI already owned the Subject Paintings. (DF 64, 106)

The Settlement Agreement also reads, "WHEREAS [BJI] maintains that it properly foreclosed on the forty-eight (48) paintings used by Edenhurst as collateral for a series of twelve loan transactions with [BJI] (the "Collateral Paintings.) A true and correct list of the Collateral Paintings is attached here to as Exhibit A"[1] (DF 55.)

Including such language in an agreement customarily means that BJI and Edenhurst agreed that BJI owned the Subject Paintings. If the parties did not agree that BJI owned the Subject Paintings such language would not be included. If Edenhurst did not agree that BJI owned the paintings, language would be included in the agreement that stated BJI did not own the Subject Paintings. If Edenhurst truly owned the paintings and/or had superior bargaining position over BJI, Edenhurst would not have agreed to such language. (DF 104)

D. The 2013 Bankruptcy Settlement Agreement with BJI.

Although Edenhurst successfully convinced the Bankruptcy Court that the Settlement Agreement did not protect BJI in the event of an Edenhurst bankruptcy, the battle between Edenhurst and BJI did not end in 2012. Edenhurst's desperate financial situation once again forced it to negotiate with BJI. In 2013, Edenhurst and BJI entered into a new settlement to resolve issues that arose in the Bankruptcy proceedings. (DF 65) A copy of the Settlement and Mr. DiGiammatteo's Declaration in support of the Settlement are attached as Exhibit 7 and 8.

The Bankruptcy Settlement included an agreement between Edenhurst and BJI to divide ownership of the Subject Paintings. Although it was not ownership of ALL of the Subject Paintings, Edenhurst did agree that BJI would own some of the paintings. The paintings that Edenhurst agreed would now be owned by BJI are referenced in Section 3 of the Agreement. (DF 66) The Court should note the language that Edenhurst used to give ownership to BJI. The

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[1] The agreement references South Beverly Wilshire Jewelry & Loan which is the DBA of Plaintiff BJI. The agreement collectively refers to Plaintiffs BJI and Yossi Dina as South Beverly. The Collateral Paintings referenced in the Agreement are the Subject Paintings.

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agreement reads at Section 3, that Edenhurst gives to BJI, "ALL of [Edenhurst's] **right, title, and interest**" in the paintings. (DF 66).

If Edenhurst would never agree to give BJI ownership of any of the Subject Paintings, why did Edenhurst give BJI ownership of a group of the Subject Paintings AFTER the Bankruptcy Court ruled Edenhurst was not required to do so? The Declaration of DiGiammatteo attached to the Bankruptcy Settlement tells the story. Once again, the agreement was necessary because of Edenhurst's financial problems. (DF 65)

BJI has provided more than enough evidence that in 2010, a financially desperate Edenhurst agreed to BJI's ownership of the Subject Paintings and would have agreed to the necessary terms to protect that ownership in the event of a bankruptcy filing. (DF 18, 19, 35-44)

IV. DEFENDANT'S MALPRACTICE CAUSED DAMAGE TO BJI.

Attached to this Opposition is the Declaration of Attorney Keith Zimmet. Mr. Zimmet is an attorney with extensive experience in commercial transactions, purchase agreements, and secured transactions. He has handled numerous complex commercial, corporate, and real estate transactions. (DF 67) He is highly experienced in drafting purchase agreements, security agreements, and also advising clients on how to best protect their interests in purchase agreements and secured transactions. (DF 68) He also has extensive experience in advising clients on how to protect their rights in an agreement in the event one or more parties to the agreement files for bankruptcy protection. (DF 69)

According to Mr. Zimmet, the Settlement Agreement signed by the parties in July of 2010 did not adequately protect BJI's ownership of the Subject Paintings in the event that Edenhurst subsequently filed for bankruptcy. (DF 70) Mr. Zimmet attributes the failures of the agreement to Defendant's breach of the standard of care and lack of experience in commercial, corporate, and secured transactions. (DF 71) In her deposition Ms. Hinman testified that she never really understood how the deal between BJI and Edenhurst was supposed to work. (DF 71). Ms. Hinman has since left the practice of law to pursue a career as a Pilates instructor. (DF 72)

Zimmet states that Edenhurst took advantage of the improper drafting of the Agreement to argue that the Settlement Agreement was in reality a disguised security agreement in which BJI's

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interest in the Subject Paintings was limited to that of at most of a secured creditor. (DF 73) Edenhurst was able to successfully make this argument because the Settlement Agreement failed to adequately protect BJI's continued ownership of the Subject Paintings. (DF 74)

Essentially, the problem with the Settlement Agreement stems from the manner in which the agreement sets out the mechanism in which Edenhurst had the opportunity to purchase the Subject Paintings from BJI. (The Purchase Agreement). (DF 56, 76) If the Purchase Agreement was properly drafted by Defendant, the Settlement Agreement could still adequately protect BJI's ownership of the Subject Paintings in the event of an Edenhurst bankruptcy. (DF 76-79) In this case, the Purchase Agreement was drafted so poorly that it allowed the Bankruptcy Court to accept Edenhurst's argument that BJI's interest in the Subject Paintings was limited to that of at most of a secured creditor. (DF 75)

According to Zimmet, the Purchase Agreement should have clearly stated that BJI and Edenhurst had agreed to an Option Agreement. (DF 76) The Purchase Agreement should have stated that BJI was giving Edenhurst the option to buy the Subject Paintings for a certain price within a two year period. (DF 77) The price would be tied to the time in which Edenhurst chose to exercise its option. (Assuming Edenhurst ever chose to actually exercise the option.) The option price to purchase the Subject Paintings would go up each month for the life of the two year option. The Purchase Agreement should have stated that during this two year period BJI would not to sell the Subject Paintings to any third party other than Edenhurst. (DF 79)

According to Mr. Zimmet, the Settlement Agreement also articulated a mechanism in which Edenhurst would act as a broker to sell certain of the Subject Paintings on behalf of BJI. (This was called a Broker Agreement). (DF 80) Again, the Settlement Agreement should have clearly explained this Broker Agreement. The Broker Agreement should explain that BJI had the option of hiring Edenhurst as a broker/agent of BJI to sell paintings selected by BJI. (DF 81) Given the specialized market for the Subject Paintings and Edenhurst's Gallery's extensive experience in selling such paintings, the agreement should explain that Edenhurst and BJI would split the sale proceeds for each painting 50-50. (DF 82) Edenhurst's shares of the proceeds would be treated as a sales commission. Any money BJI received from the sale of any paintings by

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Edenhurst would reduce the option price, because the overall inventory of the Subject Paintings would be reduced as a result of the sale of any individual painting from the group of paintings. (DF 82) A properly drafted Broker agreement would not be considered a disguised secured transaction and would have prevented the Subject Paintings from being included in any Edenhurst Bankruptcy Estate. (DF 83)

According to Zimmet, although the parties had essentially agreed to an Option Agreement and Broker Agreement, the Settlement Agreement inarticulately expresses those agreements. (DF 84) The Settlement inarticulately expresses the Option Agreement and Broker Agreement in terms commonly associated with secured transactions. The Subject Paintings are referred to as Collateral Paintings, the option price to purchase the Subject Paintings is couched in terms such as principal and interest, and includes references to a promissory note. (DF 85)

Edenhurst was able to capitalize on the improper and negligent expression of the Purchase Agreement to argue that the Bankruptcy Court should treat the entire transaction as a secured transaction. (DF 86) Mr. Dina is not a lawyer. It was the responsibility of Defendant to ensure the Settlement Agreement was drafted properly so that it would not be considered a secured transaction and to adequately explain the ramifications of the agreement to BJI. (DF 87)

Defendant claims it is not responsible for the defects in the Settlement Agreement because Yossi Dina made the agreement with Edenhurst without the benefit of advice/representation of Defendant. Defendant also complains that after Dina and Edenhurst reached a term sheet on April 29, 2010, that Defendant was "boxed in" and could not draft a settlement agreement that deviated from the April 29 term sheet. The evidence clearly demonstrates otherwise.

The Term Sheet was not signed by Yossi Dina or BJI. In fact, Dina refused to sign it and would not sign anything unless it was approved by Defendant. (DF 88) Moreover, some of the provisions and language of the Settlement Agreement were negotiated by Defendant after the preparation of the Term Sheet. (For example, the phrase "all right, title and interest" in the Subject Paintings was language prepared by Defendant.) (DF 90) Therefore the Term Sheet was not binding or enforceable against BJI. (DF 89) The Term Sheet articulated an agreement by Edenhurst that BJI owned the Subject Paintings and that Edenhurst wanted the option or ability to

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try to buy the Subject Paintings from BJI. (DF 91) The Option Agreement discussed in Mr. Zimmet's declaration is consistent with the Term sheet. (DF 92) If Defendant did not believe that the Settlement Agreement adequately protected the ownership of the Subject Paintings, basic standard of care required Defendant to clearly explain Defendant's position in writing to BJI and explain in writing to BJI the consequences of not being protected. No such writing was ever provided to BJI. (DF 93)

V. BJI'S CLAIMS AGAINST DEFENDANT ARE TIMELY.

Under California *Code of Civil Procedure* §340.6, the statute of limitations for legal malpractice is one year from the date the client suffered an "actual injury." Defendant claims that BJI suffered injury the moment the Settlement Agreement was signed in July 2010 and again in August of 2010 when an investor of BJI expressed his doubts about the strength of the Settlement Agreement. The entire premise of Defendant's statute of limitations argument fails because Plaintiff did not suffer actual injury until September 2012.

Baltins v. James (1995) 36 Cal.App.4th 1193 explains why Defendant's argument fails. In *Baltins*, the plaintiff husband and wife alleged the attorney negligently advised them about transferring and managing real property while the husband appealed an order setting aside his community property settlement agreement with his former wife. The attorney told plaintiffs that, during the appeal, the husband could treat the property as if the order did not exist. The husband transferred a ranch to his new wife, although it was a community asset of his former marriage. He also spent more than $500,000 on properties he received under the former settlement agreement. He alleged he made the expenditures because the attorney told him he would receive either title to the properties or reimbursement. After the order was affirmed on appeal, the trial court entered judgment finding the husband breached his fiduciary duties regarding the community property and denying most of the reimbursement credits he sought.

In *Baltins* the Court concluded that the statute of limitations did not begin until the trial court rendered judgment in related litigation. The Court held that "If the existence or effect of a professional's error depends on a litigated or negotiated determination's outcome, these decisions find actual injury occurs only when that determination is made." *Id.* at 1195. "Thus, if the

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propriety of an attorney's acts or advice is contingent on the outcome of a claim by or against the client, the client does not sustain actual injury until the claim is resolved adversely, which indicates both that the attorney erred and that the error caused harm." *Id.* at. 1203.

Even though the *Baltins*-plaintiffs spent money both on community property assets based on the advice of counsel and on legal representation in litigation resulting from that advice, the Court endorsed the *Baltins'* court conclusion that " any error in James's advice was not determinable, and had no effect, until following his advice resulted in the adverse judgment in the dissolution action . . . The 1993 dissolution judgment therefore is the earliest actual injury disclosed by the pleadings and materials before the court on the demurrer." *Id.* at 1208.

In reaching this conclusion, the Court explained that "[b]y itself, the quitclaim deed did not effect the loss of a right, remedy or interest, and did not constitute the imposition of a liability. [Citation.] **Instead, it presented only a threat of future harm--not yet realized-- that was insufficient to create a cause of action, and thereby end the tolling of the limitations period under section 340.6, subdivision (a)(1)."** *Id.* at 1208.

Defendants' negligence directly tracks the defendant-attorney in *Baltins*. Defendant failed to draft an Agreement that protected BJI's ownership of the Subject Paintings in the event of an Edenhurst bankruptcy. It was not until after Edenhurst filed for bankruptcy and successfully argued that the Settlement Agreement could not protect BJI's ownership of the Subject Paintings, that Defendant's negligence actually started impacting the rights of BJI and caused harm. Before that time there was nothing about the Settlement Agreement that was adjudicated to be contrary to the parties' intentions and therefore there was no "actual injury." Employing the terms of the *Baltins* Court, until the September 2012 ruling, Defendant's actions "presented only a threat of future harm--not yet realized-- that was insufficient to create a cause of action, and thereby end the tolling of the limitations period under section 340.6, subdivision (a)(1)." *Id.* at p. 1208.

Fritz v. Ehrmann (2006) 136 Cal.App.4th 1374 is also on point. In *Fritz*, a client filed a legal malpractice action in 2003, alleging the attorney failed to properly prepare a promissory note in 1995 to reflect that a third party borrower could not prepay the principal on funds borrowed from the client. The attorney argued that the client suffered actual injury when the note was

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signed in 1995 or in November 2000 when the other party to the note prepaid principal without a penalty. *Id.* at 1377-79.

The *Fritz* held that the injury was "still speculative and contingent in 1995" because it was unknown whether the borrowers would have attempted to prepay the principal or refused to repay the deferred interest. *Id.* at 1383. The court also found there were facts showing there was no actual injury in November 2000 when the borrower made the prepayment because evidence showed the client permitted the prepayment based on an independent tax reason, and not based on the attorney's alleged drafting error. *Id.* at 1384-1385.

This case tracks *Fritz*. Until Edenhurst asserted that the Subject Paintings belonged in the Bankruptcy Estate, and it was adjudicated by the bankruptcy court, it was "speculative and contingent" that Defendant's drafting error would harm BJI. BJI's claims concern the failure of Defendant to protect BJI from event that may never occur. If Edenhurst had timely purchased all of the Subject Paintings or if Edenhurst had never filed for bankruptcy, BJI would never have been harmed. The harm caused by Defendant did not move from potential to real until May 2012 at the earliest, when Edenhurst filed for bankruptcy.

Defendants recite that "a client sustains actual injury when he or she loses a clear and unambiguous interest in property." Defendant cites *Turley v. Wooldridge* (1991) 230 Cal.App.3d 586, and *Hensley v. Caietti* (1993) 13 Cal.App.4th 1165. Unlike this case, however, each of the cited cases "involved some type of immediate, tangible effect on the parties' financial affairs." (*In re Marriage of Klug* (2005) 130 Cal.App.4th 1389, 1402.)

Thus, in *Turley v. Woolridge*, *supra*, 230 Cal.App.3d 586, the court held that the plaintiff suffered an "actual injury" from "the allegedly unequal community property division when she executed" the marriage termination agreement at issue, which became effective on the date of its execution. *Id.* at 593. The *Turley* court further stated: The fact that Turley could have challenged the Agreement in an action for rescission or sought some other relief, "did not affect the date she suffered actual harm. When she signed the purportedly unfair Agreement on the alleged negligent advice of counsel and thereby rendered it effective, all essential elements of her cause of action for

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legal malpractice had occurred. There was no justification for tolling the statute of limitations beyond that point." *Id.*

Likewise, in *Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1175, the plaintiff claimed she had signed an unfavorable marital settlement agreement. The court held that she sustained an "actual injury" when she signed the agreement, not later when the ensuing judgment became effective. *Id.* at 1175-76. The *Hensley* court stated: "Negligent legal advice which induces a client to enter into a binding contract resolving marital property and support issues results in actual injury at the point of entry. Entering a contract is a jural act which alters the legal relations of the parties and creates an obligation. [Citation.] The tortious inducement to enter into a contract which imposes non-contingent obligations is actionable at the time of contracting." *Id.* "The fact that at a later point obligations imposed as a result of a contract become subject to a different means of enforcement, i.e., contempt or an action on the judgment [citations], does not delay the injury which is attributable to the imposition of the obligations. The consideration that the injury attributable to entry into the contract may be remediable by the attack on the contract does not render the injury harmless." (*Id.* at p. 1176.)

Unlike these cases however, here the fact that the Settlement Agreement did not adequately protect BJI, did not serve to immediately alter their legal relations as to that particular deficiency. BJI always claimed it owned the Subject Paintings and the Settlement Agreement did not change BJI's ownership of the Subject Paintings. Just because the Settlement Agreement itself may have altered the legal relationship of the parties is not significant. The malpractice claim is not based on the fact that a Settlement Agreement was entered into. Rather, the malpractice is based on the failure of the agreement to protect against a future contingency that might not ever occur. Thus, BJI was not injured until Edenhurst tried and succeeded in taking advantage of Defendants' drafting error.

Defendants improperly argue that under *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, there was an "actual injury" the moment the Settlement Agreement was signed without adequately protecting BJI from an Edenhurst bankruptcy. In *Jordache* the dispute turned on whether the attorney had failed to properly advise the client to

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timely tender litigation defense in a third party liability case to an insurance company. The client started suffering injury when it was forced to spend its own money to defend itself in the third party litigation. However, before suing the negligent attorney, the client sued the insurance company for failing to provide a defense. The lawsuit between the client and the insurance company would ultimately settle. *Id.* at 746. The client then filed a second lawsuit against the attorney who had not told the client to timely tender to the insurance company.

The client argued that it had not suffered an actual injury until the client's lawsuit against the insurance company had been resolved. *Id.* at 747. The *Jordache* court noted: "Jordache's right to an insurer-funded defense existed or not when that action first embroiled Jordache. The right to that insurance benefit, the impairment of that right, and Jordache's expenditures while that right was unavailable, did not arise for the first time when Jordache settled with the insurers." *Id.* at 753. Further, the Court observed that the Jordache lawsuit against the insurance company could not determine the consequences of the attorney's negligence. The resolution of the lawsuit against the insurance company was only relevant to the negligence claim against the attorney in that it "potentially affected the amount of damages Jordache might recover from Brobeck." *Id.* at 753.

The *Jordache* court emphasized the determination of when an "actual injury" occurs does not "depend on facile, 'bright line' rules," and instead requires "a factual analysis of the claimed error and its consequences." *Id.* at 752. "The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." *Id.* at 752. The analysis "concerns whether 'events have developed to a point where plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages." *Id.* at 751.

Defendant cannot invoke *Jordache*. Defendant claims that as early as August 2010 BJI was aware that the Settlement Agreement might not adequately protect BJI in the event of an Edenhurst bankruptcy. Yossi Dina disputes this point. Awareness of potential malpractice is not the same as injury. That is particularly true where, BJI always maintained their right to ownership, consistent with what BJI had been told by the Defendant. Furthermore, when the Bankruptcy Court finally examined the Settlement Agreement, the Court had tremendous difficulty trying to figure out if the Agreement adequately protected BJI, due to the ambiguities of

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the Agreement. (The Court's tentative ruling was actually in BJI's favor.) (DF 11) If an experienced Bankruptcy Court had trouble grappling with the complexities created by a poorly drafted agreement, it can hardly be said that Mr. Dina could have known whether the agreement was defective before the Bankruptcy Court's Order in September 2012.

The premise of Defendant's motion is that BJI should have and could have sued Defendant in August of 2010. Imagine if BJI sued Defendant in August of 2010. BJI would not be able to demonstrate any injury or cause of action at the time of the demurrer. Essentially the hearing would go as follows: "Your Honor, we are concerned that the Settlement Agreement might not adequately protect BJI's ownership of the Subject Paintings in the event Edenhurst files for bankruptcy. What do you mean, the agreement MIGHT not adequately protect? Has Edenhurst filed for bankruptcy? No. Do you think they will file for bankruptcy? We have no idea. Does Edenhurst have any plans to dispute ownership of the Subject Paintings? We don't know. Right now they are simply trying to buy the Subject Paintings from BJI. Does Edenhurst even know there is a problem with the Subject Agreement? We're not sure. We're just filing this lawsuit to protect ourselves in the event Edenhurst might decide to file bankruptcy and in case a bankruptcy judge should later decide this agreement does not provide adequate protection."

Defendant relies on emails from Anthony Podell in August of 2010. Podell was an investor that occasionally loaned money to BJI. Defendant argues that in August of 2010 Podell expressed concern to BJI that there might be problems with the Settlement Agreement. Defendant argues that Podell's concerns in August of 2010 caused immediate injury to BJI. Defendant does not meet its burden in establishing facts or legal authority that Podell's concerns in August of 2010 caused Plaintiff injury in 2010. The fact that a third party expressed concerns about the Settlement Agreement hardly constitutes basis for bringing a malpractice action.

Attached to this Opposition is the Confidential Declaration of Shlomo Barash. Mr. Barash is a Certified Public Accountant and has served as BJI's Controller since 2008. (DF 94) Mr. Barash has access to BJI's business records and oversees all of the bookkeeping and accounts at BJI. (DF 95) As set forth in Mr. Barash Declaration, Mr. Podell made a substantial loan to BJI on August 27, 2010. (The emails cited by the Defendant are dated August 12th and August 19th). (DF

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96-97) Furthermore, between 2011 and 2013 Mr. Podell made a series of substantial loans to BJI. One such loan took place on February 26, 2013, the date this action was filed. (DF 98) Whatever concerns Podell may have had about the Settlement Agreement did not stop him from loaning BJI money.[2]

According to *Jordache* there is a distinction, "between an actual, existing injury that might be remedied or reduced in the future, on the one hand, and, on the other, a speculative or contingent injury that might or might not arise in the future." (*Id.* at 754.) Essentially in some cases litigation will only impact the scope of damages, not the existence of damages. These cases are similar to *Jordache*. Cases where no injury can exist before there is a ruling from a Court, such as this case fall outside of *Jordache* and are similar to *Baltins v. James* (1995) 36 Cal.App.4th 1193. In a case where the existence of a client's injury as a result of attorney negligence is contingent on the outcome of litigation, the client sustains no injury, and the limitations period does not begin to run, until the underlying action is resolved adversely to the client. (*See, e.g., Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1406 [where attorneys had provided plaintiff legal advice with respect to the documents and in connection with subsequent negotiations involving those documents, and where the decision adverse to plaintiff in the underlying case was based on such documents and transactions, client suffered actual injury on confirmation of adverse arbitration award.]

VI. DEFENDANT'S AFFIRMATIVE MISREPRESENTATIONS CONSTITUTE FRAUD AND A BREAH OF FIDUCIARY DUTY.

"An attorney is a fiduciary of the 'very highest character.' [Citations.] By the very nature of the relationship, an attorney owes the client a duty to act with the highest good faith. [Citation.] Consistent with the fiduciary nature of the relationship, the duty of the attorney includes placing the interest of the client above his or her own interest." (*Howard v. Babcock* (1993) 6 Cal.4th 409,

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[2] Defendant claims that BJI was having difficulty paying its investors in February of 2012. Defendant provides no evidence that Defendant's malpractice was the cause of the difficulty. In addition, Plaintiff attaches evidence disputing the claim. (DF 128-129).

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431.) Whether an attorney has breached a fiduciary duty to his or her client is a question of fact. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890.) A breach of fiduciary duty is a species of tort distinct from a cause of action for professional negligence. (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 382-383.) The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the breach. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.)

"Fraud" for purposes of a punitive damage award means "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (*Civil Code* §3294(c)(3); CACI 3940, 3941; BAJI 14.71, 14.72.1.) Plaintiff can recover punitive damages upon a showing of CC §3294(c)(3) "fraud" whether or not defendant's underlying liability rests on a fraud cause of action. *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911, 947-948.) Plaintiffs' allegations that defendants wrongfully and deliberately engaged in a scheme to defraud their clients, are more than ample to state a cause of action for fraud. (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1158-1160. The Court also held "[a]n intentional failure to disclose is an actionable fraud in the presence of a fiduciary duty to disclose." (*Id.* at p. 1159.) In *Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 344, the Court affirmed a fraud judgment: It is well established a client may pursue claims of fraud against his or her attorney in the nature of a malpractice action. As a commentator has explained: "Fraud or deceit is not legal malpractice . . . . Fraud is no more a necessary incident to the rendition of legal services than dishonesty is to any other profession. The avoidance of fraudulent conduct requires no special skill or knowledge, but only basic precepts of honesty and integrity." (Mallen & Smith, Legal Malpractice (3d ed. 1989) §8.8, p. 421.)

Yossi Dina testified that his attorneys specifically told him that the Settlement Agreement gave BJI ownership of the paintings and that BJI's ownership of the Subject Paintings was protected in the event of a bankruptcy. (DF 47-48) Dina signed the Settlement on behalf of himself and BJI based on these representations. (DF 49) Turken and Hinman testified in their depositions that they never believed the Settlement Agreement gave BJI ownership of the

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paintings or protected ownership of the paintings. (DF 50) If Turken and Hinman never believed that Subject Paintings were protected by the Settlement Agreements they made affirmative and material misrepresentations to BJI and breached their duties to BJI. (DF 46-49, 130.)

VII. YOSSI DINA IS A PROPER PARTY TO THIS ACTION.

Defendant claims Yossi Dina should be dismissed because he suffered no damages. This contention is groundless. First, Defendant does not sustain its initial burden on summary judgment, because the evidence it submits does not support its contention. Mr. Dina was personally named in the State Court Action. (DF 99) Both he and BJI are signatories to the Settlement Agreement. In the first paragraph of the Settlement Agreement Dina and BJI are collectively referred to as South Beverly. (DF 100) The Settlement Agreement says that South Beverly (Dina and BJI) own the Subject Paintings, gave Edenhurst the option to purchase the Subject Paintings from South Beverly (Dina and BJI), and stated that South Beverly (Dina and BJI) retained ownership of the Subject Paintings in the event of a bankruptcy. (DF 101). It should also be noted that Defendant has Cross Complained to recover approximately $300,000 in legal fees for all of the stellar work Defendant did in protecting BJI and Dina's ownership of the Subject Paintings. Defendant has sued both BJI and Dina individually. (DF 131). Mr. Dina is a proper party to this action.

VIII. CONCLUSION.

For the above reasons, Defendant's motion should be denied in full.

DATED: August 11, 2014

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PROOF OF SERVICE
(C.C.P. 1013A, 2015.5)

STATE OF CALIFORNIA

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 100 Wilshire Boulevard, 21st Floor, Santa Monica, California 90401.

On August 11, 2014 I served the foregoing document, described as **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT/SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action.

___ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

_X_ by placing ___ the original _X_ a true copy enclosed in sealed envelopes addressed as follows:

___ **BY MAIL.**

___ I deposited such envelope in the mail at Santa Monica, California. The envelope was mailed with postage thereon fully prepaid.

___ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

_X_ **BY OVERNIGHT DELIVERY.** I caused such envelope to be deposited with a delivery service (Federal Express) in Santa Monica, California, for overnight delivery to the addresses set forth on the attached mailing list.

Executed on August 11, 2014 at Santa Monica, California.

___ **BY FACSIMILE.** I faxed a copy of the above-described document to the interested parties as set forth [above/on the attached mailing list].

___ **BY E-MAIL OR ELECTRONIC TRANSMISSION.** I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed on the Service List. I did not receive, within a reasonable time after transmission, any electronic message or other indication that the transmission was unsuccessful.

_X_ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Robert Gersten _____
Name **Signature**

SERVICE LIST

BY FEDERAL EXPRESS Kenneth Pedroza, Esq. Matthew S. Levinson, Esq. Cole Pedroza LLP 2670 Mission Street, Suite 200 San Marino, CA 91108 Tel: (626) 431-2787 Fax: (626) 431-2788 Email: kpedroza@colepedroza.com mlevinson@colepedroza.com	Attorneys for: DICKSTEIN SHAPIRO, LLP; JAMES H. TURKEN; CHANDA R. HINMAN