UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 14-00541 JVS(DFMx)	Date	January 29, 2016
Title	Hani Maim Saeed Sharaf v. Starbuzz Tobacco Inc.		

Present: The Honorable	James V. Selna
Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Order Granting Defendant's Motion for Summary Judgment and Denying as Moot Defendant's Motion to Bifurcate**

Defendant Starbuzz Tobacco, Inc. ("Starbuzz") moves for summary judgment on Plaintiff Hani Naim Saeed Sharaf's ("Hani")[1] claims pursuant to Federal Rule of Civil Procedure 56. (D.'s Mot. Summ. J. ("Mot."), Docket ("Dkt.") No. 69.) In the alternative, Starbuzz moves for partial summary judgment on certain of Hani's claims or Starbuzz's defenses. (Id.) Hani opposes Starbuzz's motion. (Opp'n to Mot. ("Opp'n"), Dkt. No. 81.) Starbuzz filed a reply. (Reply, Dkt. No. 83.)

In accordance with Local Rule 56-1, Starbuzz filed a proposed Statement of Uncontroverted Facts and Conclusions of Law ("SUF"). (Dkt No. 69-1.) Hani filed a document styled "Statement of Uncontroverted Facts and Conclusions of Law," ("GMFID") which is in substance a statement of genuine disputes pursuant to Local Rule 56-2, (GMFID pp. 2–20, Dkt. No. 81-3), as well as Hani's own recitation of purported uncontroverted facts. (Id. p. 21.) Starbuzz responded. (Response, Dkt. No. 83-3.)

As set forth below, the Court grants Starbuzz's motion.

I. Background

Except where otherwise noted, the following background is based on Hani's GMFID. The Court also considers Starbuzz's response, and the parties' evidentiary

[1] Because multiple persons related to the dispute have the surname "Sharaf," the Court refers to these individuals by their given names.

objections. (Dkt. Nos. 83-1, 83-2.)

A. The 2005 Agreement

In October 2005, Wael Elhalwani ("Elhalwani"), Hani, and Bassam Said Yousef Sharaf ("Bassam") signed a contract titled "Involvement and Partnership Agreement." (GMFID ¶ 1; Declaration of Hani Naim Saeed Sharaf ("Decl. Hani") Ex. B ("2005 Agreement"), Dkt. No. 81-1.) The principal components of the 2005 Agreement are set forth below.

- **Article Two:** "The management of [Starbuzz] shall enter [Hani] and [Bassam] into the company as partners." (2005 Agreement.)

- Bassam and Hani were each to receive 24.5% of the company pursuant to this contract under Articles Three and Four. (Id.)

- **Article Five:** "The management of [Starbuzz] shall prepare contracts of work for each of [Hani] and [Bassam] and set a basic monthly salary . . . additionally, the management of [Starbuzz] shall set a monthly commission of payment valued equally at 24.5% for each of [Hani] and [Bassam]." (Id.)

- **Article Six:** "The responsibility of the second and third parties, their duties, and their obligations shall be set at a meeting held with all of the partners of the [Starbuzz] after it has been officially proven that [Hani and Bassam] have officially become partners in the company." (Id.)

- **Article Eight:** "The principal tasks of [Hani and Bassam] shall be to produce Mu'assal tobacco of all kinds; the responsibility for production shall be on [Hani and Bassam]; all costs and expenses of production shall be on [Starbuzz]; [Starbuzz] shall provide to [Hani and Bassam] the material and other things required to enable them to conduct the production process." (Id.)

- **Article Nine:** "The responsibility of general management and of marketing the Mu'assal tobacco product shall be on [Starbuzz] alone." (Id.)

- **Article Eleven:** "[Hani and Bassam] shall be obligated to equip the place of

Mu'assal tobacco production with the equipment, devices, machines, and whatever else is required in the production process . . . ; the cost of equipment shall be on them; [Starbuzz] shall be obligated to provide the location of the factory." (Id.)

- **Article Twelve:** "If [Hani and Bassam] desire to withdraw from the management of Starbuzz, they must take all of the legal measure for such; in addition, [Hani and Bassam] must concede their percentage or share of the capital of the company and / or shares of the company to [Starbuzz] . . . ." (Id.)

- **Article Thirteen:** "[Hani and Bassam] shall be obligated to, upon conceding their percentage or share of the capital of the company and / or shares of the company to the first party, instruct and train the first party on the full process of producing Mu'assal tobacco specific to the StarBuzz mixture." (Id.)

Two other components of the 2005 Agreement, set forth below, are relied upon by the parties in their briefs on this motion, although the Court concludes they are unnecessary for the resolution of this motion.

- **Article Ten:** "[Hani and Bassam] may not produce Mu'assal tobacco of any kind in any other factory or in any place within the borders or [sic] the United States of America and / or any country in the world for any party whatsoever, whether legal persons or individuals, without the written agreement of the first party." (Id.)

- **Article Fifteen:** "In the case that any of the parties to this agreement violates any article of this agreement and / or any party does not uphold its obligations, this agreement shall be considered void and the party in violation of its obligations shall pay a penalty clause to the other party equal to the value of [$250,000] or the equivalent in Jordanian dinar." (Id.)

B. Events between 2005-2009

Hani declares that he never called Elhalwani to rescind the 2005 Agreement, that he never informed anyone of his intention to rescind the agreement, and that even if Bassam rescinded the agreement, Hani did not. (Decl. Hani ¶¶ 65–69.) However, Hani undertook no efforts towards conduct that would satisfy Articles Eight, Eleven, or Thirteen of the 2005 Agreement until 2009. (GMFID ¶¶ 17–18; Decl. Hani ¶ 25.)

In the meantime, Hani remained in Jordan and assisted or facilitated the production and export of Mu'assal tobacco from Jordan to the United States for Starbuzz. (GMFID ¶¶ 19–20, 24, Decl. Hani ¶¶ 20, 23.) Contrary to Article Ten of the 2005 Agreement, Bassam continued to sell tobacco to third parties. (GMFID ¶¶ 56, 59; Decl. Bassam Sharaf Supp. Mot. Summ. J. ("Decl. Bassam") ¶¶ 6–10.)

Towards the end of 2008, Starbuzz entered into a new contract with several parties (including Bassam and Hani) to set up a manufacturing facility in Jordan. (GMFID ¶¶ 33, 34.) That new agreement was rescinded. (Id. ¶ 39.)

C. Hani's Purported Performance in 2009

Beginning in 2009, Hani and Bassam came to the United States to begin enabling Starbuzz to produce some products domestically. (Id. ¶¶ 42–43.) Contrary to Article Eleven of the 2005 Agreement, Starbuzz paid for the machines and manufacturing equipment that would be used in this endeavor. (Id. ¶¶ 46–47.) This was another failed project. (Id. ¶ 51.) Hani remained in the United States. (Id.) Starbuzz paid Hani approximately $5,000 to $5,500 per month and provided him with a house, a vehicle, a mobile phone, and other benefits. (Id. ¶ 53.)

However, Hani left Starbuzz in July 2011. (Id. ¶ 54.) At that point, Starbuzz was not producing its own tobacco product in the United States. (Id. ¶ 55.)

II. Legal Standard

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Material facts are those necessary to the proof or defense of a claim, and are determined by the underlying substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

To determine whether summary judgment is appropriate, federal district courts must engage in a two-step process. First, the party moving for summary judgment bears the initial burden to show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). This burden may be satisfied by either (1) presenting evidence that negates an element of the non-moving party's case or (2) showing that the

non-moving party has failed to establish an element of the non-moving party's case. Id. at 322–23. If the party moving for summary judgment does not bear the burden of proof at trial, it may show the absence of a genuine issue of material fact by showing that "there is an absence of evidence to support the non-moving party's case." Id. at 325. Second, if the moving party has met its initial burden, the burden then shifts to the party opposing summary judgment to designate "specific facts showing there is a genuine issue for trial." Id.

In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255. However, when the non-movant's purported evidence or interpretation of events is "blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007).

"A party asserting that a fact cannot be . . . genuinely disputed must support the assertion by citing to particular parts of materials in the records, including . . . affidavits or declarations . . . ." Fed. R. Civ. P. 56(c)(1)(A). However, "an affidavit or declaration used to support . . . a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

III. Discussion

A. Objections to the Hani Declaration

As an initial matter, Starbuzz asserts that the declaration of Hani submitted in opposition to Starbuzz's motion should be stricken. (Reply 1, 8.) Starbuzz argues that a substantial amount of Hani's declaration is contradicted by his own prior testimony and responses to discovery. (Id. 2.) Starbuzz also contends that Hani's "credibility is extremely suspect." (Id. 8.)

A party may not create an issue of fact by contradicting his prior testimony, unless the testimony is shown to have resulted from mistake or confusion. See Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999); Block v. City of Los Angeles, 253 F.3d 410, 419 n.2 (9th Cir. 2001). The Court has the discretion to determine whether

a contradiction is in fact a "sham." Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266–67 (9th Cir. 1991). See also Yeager v. Bowlin, 693 F.3d 1076, 1080–81 (9th Cir. 2012) (finding that affidavit should be considered a sham when it contradicted deposition testimony was not an abuse of discretion). However, the declarant is permitted to elaborate upon, explain, or clarify the prior testimony elicited by opposing counsel at deposition. Messick v. Horizon Indus., Inc., 62 F.3d 1227, 1231 (9th Cir. 1995).

The Court finds that Hani's declaration is not so clearly a "sham" under these precedents that it can weigh the declaration's credibility on Starbuzz's motion for summary judgment. Starbuzz overstates its argument that much of the declaration is contradictory because, in fact, many of the paragraphs that Starbuzz cites as contradictory are entirely consistent with Hani's prior testimony as the declaration either elaborates or clarifies prior testimony, or the declaration focuses on issues not addressed in Hani's depositions.[2]

The only statement the Court concludes is contradictory is the timing of the sale of Hani's company, Al Naim. (See D.'s Evid. Objs. Decl. Hani ("Objs.") ¶ 10, Dkt. No. 83-1.) In a December 17, 2014 deposition, Hani previously testified that the company was sold in May 2005. (COE 22–23.) But in the same deposition just minutes earlier, Hani had also stated that the company was sold "upon signing this agreement." (COE 21.) Hani's declaration is consistent with this earlier deposition testimony, and while Hani's inconsistent answer to the question "what date did you sell the company" is probative of Hani's credibility, it is not so clearly a sham that the Court should exercise its discretion and strike the Hani declaration in its entirety or as to the date Hani sold Al Naim.

However, Hani's introduction of an untranslated personal check written in Arabic is entitled to no weight.[3] Under the Local Rules in this District, all documents must be

[2] One particularly glaring example is Starbuzz's assertion that it is inconsistent for Hani to declare that he put his "faith, hopes, and efforts in [Starbuzz]" when Hani had previously testified that he actually had a concurrent career with the United Nations. (See Objs. ¶ 19, Dkt. No. 83-1.) Innumerable examples of entrepreneurs, inventors, actors, musicians, and other individuals, indicate that many very successful endeavors—and many more unsuccessful ones—that represent the "faith, hopes, and efforts" of individuals begin as side-projects for people who already work in a different career.

[3] (Decl. Hani Ex. E.)

presented in English unless an English translation is concurrently provided or the Court orders otherwise upon a showing of good cause. L.R. 11-3.10. There has been no showing of good cause. Consequently, the Court strikes Exhibit E of the Hani Declaration. The remainder of paragraph 26 of the Hani declaration is competent testimony.

B. Rescission of the 2005 Agreement

1. Express Rescission

Starbuzz argues, "undisputed material facts unquestionably show that all parties, including Hani, mutually rescinded the 2005 Agreement before any had begun to perform their duties and obligations." The Court disagrees that there is no genuine dispute regarding whether there was a mutual, express rescission.

Starbuzz cites to Hani's deposition for the purportedly uncontroverted fact that "shortly after signing the 2005 Agreement, the parties decided not to perform according to the agreement." However, the portions of Hani's deposition that Starbuzz cites to do not refer to the parties' nonperformance. For example, in Hani's first deposition he testified that although Elhalwani called to tell Hani that Starbuzz was unable to perform its obligation to bring Hani to the United States immediately, Elhalwani simultaneously stated "he apologized . . . and that once [Elhalwani] was able, he [would] make it happen." (COE 2:2–11.)

Starbuzz also cites to Hani's deposition for the purportedly uncontroverted fact that Hani remained in Jordan as a supplier of Starbuzz. However, the cited declaration itself contains a basis of the genuine dispute on the issue of express rescission, because Hani testified at the deposition that Elhalwani told Hani, "Once I'm ready, I will give you a call, okay, and we can start doing it together. In the meantime, Hani, keep sending me products from Jordan. So it's not me that delayed this stuff." (COE 25:23–25 through 26:1–2.) This expression does not evidence the fact that there was a rescission, instead it evidences an assurance that the 2005 Agreement would be performed when a condition frustrating performance, imposed by a third party, was lifted.

The remainder of Starbuzz's evidence for its proposition that the parties mutually rescinded by express oral agreement involves a weighing of credibility of the testimony

of Bassam and Elhalwani and the testimony of Hani (including Hani's declaration submitted in opposition to this motion). Such a weighing is not appropriate on a motion for summary judgment. Anderson, 477 U.S. at 255. Also, certain evidence[4] asserted by Starbuzz for Hani's purported admission that the 2005 Agreement was rescinded is inadmissible and improper because it relates to settlement negotiations. Fed. R. Evid. 408(a). The remainder of the Bilal Haidari declaration merely conflicts with Hani's declaration and implicates a weighing of credibility.

2. Implied Rescission

Starbuzz next argues there is uncontroverted evidence that the parties' course of conduct from 2006 to 2009 demonstrates that the parties rescinded or abandoned the 2005 Agreement. (Mot. 9–12.) Starbuzz is correct that an abandonment or rescission of an agreement may be implied from the unequivocal conduct of the parties which is inconsistent with the continued existence of a contract. Honda v. Reed, 156 Cal. App. 2d 546, 539–540 (1958). See also Williston on Contracts § 73.16 (4th ed.).

Here, uncontroverted evidence indicates that from 2006 through 2011 Hani was acting as a procurer from Jordanian suppliers on behalf of Starbuzz. The uncontroverted evidence indicates that several other contracts were signed in the interim, with Hani receiving monthly payments. (GMFID ¶ 28.) These alternative arrangements, concerning the same or similar subject matter as the 2005 Agreement, are inconsistent with the parties' intentions to follow through with the 2005 Agreement.

Next, the parties (and others) entered into a 2008 agreement to establish a business known as Starbuzz Jordan.[5] (GMFID ¶ 33.) This agreement was signed by all three parties to the original 2005 Agreement and indicate that either the 2005 Agreement had previously been abandoned or evidence an intent to abandon that prior arrangement. Although a second venture does not always indicate that an initial venture is abandoned,

[4] (See, e.g. Declaration of Bilal Haidari, 15–16; COE 298–303.)

[5] Hani argues that Starbuzz was not a party to the 2008 agreement. (GMFID ¶ 33, Opp'n 14–15.) This argument does not raise a genuine issue of material fact because it lacks explanation and evidence of the significance of the difference between "Starbuzz Company, Inc." and "Starbuzz Tobacco Company."

this agreement, executed years after the 2005 Agreement, concern very similar subject matter (i.e. where to produce Mu'assal tobacco), and was executed before any party began any performance of the 2005 Agreement. Cf. Honda, 156 Cal. App. 2d at 539 ("Abandonment of a contract may be implied from the acts of the parties in negotiating for a new and different contract concerning the same property or subject matter.").

Additionally, with regard to Hani's purported performance in 2009, the uncontroverted[6] evidence establishes it was Starbuzz that paid for the equipment that was installed in Starbuzz's U.S. facility, not Hani. (GMFID ¶¶ 69–83. See also COE 141–145, 201–203.) Hani does not put forth any evidence to provide an alternative explanation for why Starbuzz paid for this equipment. In the absence of evidence to support an alternative theory, this evidence and the fact that Hani was the one who essentially billed Starbuzz for the cost of Starbuzz's manufacturing equipment, do not make sense in light of the 2005 Agreement's Article Eleven ("the cost of equipment shall be on [Hani and Bassam]") unless it was recognized by all that the parties had walked away from the 2005 Agreement.

At the hearing, counsel for Starbuzz reiterated that the uncontroverted facts establish that Bassam, in violation of Article Ten of the 2005 Agreement, produced and sold Mu'assal tobacco for third parties following execution of the 2005 Agreement. (GMFID ¶¶ 56–59, 63.) Although the Court is skeptical that the actions of one party to a three-party agreement can, alone, impliedly rescind the agreement as between the other two parties (and Starbuzz provides no authority for such a rule), this fact does provide at least some evidence that the parties considered the 2005 Agreement rescinded. The Court declines to opine on whether Article Fifteen of the 2005 Agreement (the "penalty," voiding clause) is enforceable as a matter of law as to Hani based on Bassam's conduct.

Consequently, the uncontroverted evidence leads the Court to hold that no

[6] The conclusory paragraph 26 of Hani's declaration that he paid for his share of equipment does not create a genuine issue of material fact on this issue. Hani does not explain why Starbuzz was invoiced for this equipment or posit any alternative theory as to why the equipment ended up on the operational report or why the amount listed on the operational report was added to the ongoing balance sheet. (See GMFID ¶¶ 73–77.) It is also unclear what Hani refers to by "his share;" Hani provides no explanation for what "share" he actually paid for, what share he was obligated to pay for, or who was obligated to pay for other shares.

reasonable jury could fail to find that the parties rescinded the 2005 Agreement by their conduct. Starbuzz is entitled to summary judgment on the fact that the 2005 Agreement was rescinded.

C. Breach of Contract Claim

To state a claim for breach of contract under California law, a plaintiff must allege: (1) the existence of a contract; (2) the plaintiff's performance, or excuse for non-performance, under the contract; (3) breach of contract; and (4) resulting damages. Walsh v. W. Valley Mission Cmty. Coll. Distr., 66 Cal. App. 4th 1532, 1545 (1998).

Because the Court holds that no reasonable jury could find that the parties did not rescind the 2005 Agreement, Hani's breach of contract claim fails as a matter of law. The 2005 Agreement is the agreement that forms the basis of Hani's present suit. (See First Amended Complaint ¶¶ 28-33, Dkt No. 9.) However, because no reasonable jury could fail to find the 2005 Agreement was rescinded, Hani cannot satisfy the first element of a breach of contract cause of action.

Accordingly, Starbuzz is entitled to summary judgment on Hani's claim for breach of contract.

D. Fraud

As stated in the Court's prior order, Hani's second claim "amounts to one for promissory fraud, asserting that he was fraudulently induced to enter into the [2005 Agreement] with Starbuzz to build the manufacturing plant and supply tobacco." (Order Denying D.'s Mot. Dismiss ("Prior Order") 10, Dkt. No. 13)

To maintain a claim for promissory fraud or fraudulent inducement under California law, a plaintiff must provide evidence of: (1) a misrepresentation; (2) with knowledge of its falsity; (3) with intent to defraud; (4) justifiable reliance; and (5) resulting damages. Lazar v. Superior Court, 12 Cal. 4th 631, 638 (1996).

Whether a defendant had an intent to defraud is a question of fact. See Cal. Civ. Code § 1574; Grant v. U.S. Elecs. Corp., 125 Cal. App. 2d 193, 199 (1954). However, a plaintiff must show some evidence of fraudulent intent to overcome summary judgment.

Tenzer v. Superscope, Inc., 39 Cal. 3d 18, 30 (1985). Fraudulent intent cannot be inferred from mere nonperformance of the promise. Id. However, it *can* be inferred by a breaching party's continued assurances. See id. citing Prosser, Torts (5th ed. 1984)) ("fraudulent intent has been inferred from such circumstances as . . . [defendant's] continued assurances after it was clear he would not perform.").

On summary judgment, Hani bears the burden of bringing forth some evidence of fraudulent intent. The first fact that Hani asserts to support a reasonable inference of fraudulent intent is Elhalwani's purported failure to inform his father ("Salim") about the 2005 Agreement.[7] (Decl. Hani ¶ 40. See also COE 234.) Hani asserts that because Salim was the owner of Starbuzz, the failure to inform Salim evidences Elhalwani's fraudulent intent.

This is not sufficient. As explained in the depositions on which Hani relies, Salim had delegated matters such as entering contracts with foreign suppliers to Elhalwani as CEO of Starbuzz. (See COE 234, 703–704 (explaining Elhalwani's broad authority).) Hani fails to put forth evidence that Elhalwani's actions exceeded the scope of Elhalwani's authority as conferred by Salim.

However, Hani also put forth his declaration stating that in or around early 2011, Elhalwani made certain assurances that Starbuzz was performing and would continue to perform under the contract. (Decl. Hani ¶¶ 35–38.) This took place after other alleged assurances in previous years. (Id. ¶¶ 21, 23, 56–58, 75–76.) By at least this later, 2011 assurance, it would have been clear that Starbuzz would not perform under the contract because the contract had either been mutually rescinded or Hani was entitled to his ownership interest under the 200 Agreement because he had completed setting up equipment at Starbuzz's United States facility in 2009. (Id. ¶¶ 25–29.) Although the evidence is thin, conclusory, and lacking in substantial detail, Hani's declaration that Elhalwani assured Hani of performance under the contract is sufficient on a motion for summary judgment to create a triable issue of material fact regarding Starbuzz's

[7] In violation of Local Rules 56-1 and 56-2, this assertion of material fact was not included in Hani's GMFID or separate statement of uncontroverted facts. (See Dkt. No. 81-3.)

fraudulent intent.[8]

The other elements of a promissory fraud claim are similarly met. The alleged misrepresentation is the promise that Starbuzz would make Hani a partner. (2005 Agreement Arts. 2–3.) Hani would also be justified in relying on a written contract as proof of a party's intention to perform the terms of an agreement, and a jury could find that Hani relied on the contract as his inducement to come to the United States in 2009 to set up equipment. (Decl. Hani ¶¶ 24–25, 27–34.) Finally, Hani has done very little to support his damages with evidence, such as by showing that Hani was under compensated for any work done in arranging for the installation of the Mu'assal tobacco equipment. There is also no dispute that Hani was, in fact, compensated for his work between 2005 and 2011. (See GMFID ¶¶ 20, 28, 53.) However, there is at least testimonial evidence that would permit a jury to find that Hani's damages are greater than nominal damages. (Decl. Hani ¶¶ 15, 26.)

Consequently, Hani has set forth sufficient evidence to create a genuine issue of material fact on his claim for promissory fraud.

E. Statute of Limitations

1. Breach of Contract

Under California law, the applicable statute of limitations for breach of a written contract is four years. Cal. Civ. P. Code § 337. Hani filed his lawsuit on April 8, 2014. (Dkt No. 1.) Thus, if the breach of contract occurred before April 8, 2010, Hani's claim is barred by the statute of limitations. This Court should find for Starbuzz on its motion for summary judgment if the uncontroverted facts establish that the breach occurred before April 8, 2010.

As the Court noted in its Prior Order, "The [2005 Agreement] does not clearly define the duties that [Hani] must perform to obtain his partnership. Article Eight provides that his principal task is to produce Mu'assal tobacco, but does not provide guidelines on what qualifies as performance of this responsibility. Consequently, both the

[8] A jury may also infer the scienter element from the assurances made that straddle the date Hani claims to have performed under the contract in 2009.

order of and time for performance for either party under the [2005 Agreement] are unclear." (Prior Order 8.)

Nevertheless, Article Eleven provides a bit more specificity. It states that Hani and Bassam must "equip the place of Mu'assal tobacco production with the equipment, devices, machines, and whatever else is required in the production process confirming to United States standards and specifications." (2005 Agreement.)

Hani's theory that his claim is not barred by the statute of limitations puts substantial weight on a proposed construction of the term "whatever else is required in the production process." (See Decl. Hani ¶¶ 29–34.) Hani contends that merely setting up equipment would not satisfy his obligations under the 2005 Agreement and that before he was entitled to his share of the company, Hani had to set up "processes related to product development, sales, packaging, shipping, manufacturing staff training and supervision, and accounting of production." (Id. ¶ 32.) The Court disagrees, and finds that Hani's proposed construction of Article Eight is unreasonable.

Just as the Court previously held, the 2005 Agreement's language is ambiguous and thus the Court must turn to other evidence to construe the terms of the 2005 Agreement. See Cal. Civil Code §§ 1635–1663.; Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. California, 618 F.3d 1066 (9th Cir. 2010) quoting Parsons v. Bristol Dev. Co., 62 Cal. 2d 861, 865 (1965) ("It is solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of the extrinsic evidence."); Wolf v. Walt Disney Pictures and Television, 162 Cal. App. 4th 1107, 1125–26 (2008) ("The interpretation of a contract is a judicial function."). As stated below, the Court relies on intrinsic evidence, the 2005 Agreement itself, and no credibility determination is required. Therefore, it is appropriate for the Court to resolve the ambiguity.

Here, intrinsic evidence confirms that Hani's proposed construction is an unreasonable interpretation of Articles Eight and Eleven of the 2005 Agreement. Article Nine of the 2005 Agreement states that Starbuzz will have sole responsibility for "general management" and marketing of Mu'assal tobacco products. (2005 Agreement.) Further, Article Thirteen states that Hani (and Bassam) must "upon conceding their percentage or share of [the company] to [Starbuzz], instruct and train Starbuzz on the full process of producing Mu'assal tobacco specific to the StarBuzz mixture." (Id.) The implication is

obvious. Duties such as training of staff—indeed all non-equipment installation duties—are not a condition contemplated by Article Eight and Eleven and, as to training, is actually an obligation that, by logical necessity, arises only after Starbuzz remits the percentage of the company to Hani and Bassam pursuant to Articles Three and Four.

At the hearing, counsel for Hani suggested that the Court must read Article Thirteen in conjunction with Article Twelve, relating to withdrawal from the company. The interplay between Article Twelve and Article Thirteen does not change the Court's analysis or interpretation. The Court's analysis is focused on Articles Eight and Eleven, the only Articles that plausibly set a condition antecedent to Starbuzz's duties to perform under Articles Two, Three, Five, and Six. If training was already one of the "principal tasks" of Hani under Article Eight or among "whatever else is required in the production process" under Article Eleven as Hani asserts, then his later obligation under Article Thirteen would be a redundant one, a result that is to be avoided in contract interpretation.[9] See Mass. Bay Transp. Auth. v. United States, 129 F.3d 1226, 1231 (Fed. Cir. 1997) ("It is a fundamental rule of contract interpretation that the provisions are viewed in the way that gives meaning to all parts of the contract, and that avoids conflict, redundancy, and surplusage among the contract provisions.").

At the hearing, counsel for Hani also suggested that it is unreasonable to think that the parties would intend an interpretation whereby the obligations antecedent to Hani being entitled to his share of equity can be satisfied prior to Hani completely setting up the entire production process.[10] Counsel seems to suggest it would make no sense for Starbuzz to agree to part with substantial equity until Hani put forth significantly more work. (See also Decl. Hani ¶ 29.) This argument misunderstands the incentives of persons with equity. Countless partnership agreements are struck between entrepreneurs on the basis of trust and the prospect of cooperative endeavor rather than pure capital contribution or the amount of work contributed up to the date of the transfer of equity. These agreements are not unreasonable.

[9] Another canon of construction, *ejusdem generis* (specific words limit general words) provides further rationale for holding that the term "whatever else is required in the production process" pertains to equipment installation rather than training employees.

[10] By which Hani intends to mean "product development, sales, packaging, shipping, manufacturing staff training and supervision, and accounting of production." (Decl. Hani ¶ 32.)

Consequently, if Starbuzz breached the 2005 Agreement, the uncontroverted[11] evidence establishes that such breach occurred—at the latest—when Starbuzz failed to perform after Hani's purportedly successful efforts to set up the equipment in Starbuzz's factory in or around 2009. (See Decl. Hani ¶¶ 24–29; GMFID ¶¶ 42–47.) Because "in or around 2009" predates April 8, 2010, the uncontroverted evidence establishes that Hani's breach of contract claim is barred by the statute of limitations.

Accordingly, Starbuzz is entitled to summary judgment on its twelfth affirmative defense asserting the statute of limitations and is entitled to summary judgment on Hani's breach of contract claim.

2. Fraud

Under California law, the applicable statute of limitations for a claim for fraud is three years. Cal. Civ. P. Code § 338(d). The cause of action does not accrue until the plaintiff discovers, or has reason to discover, the cause of action. Fox v. Ethicon, 35 Cal. 4th 797, 806–07 (2005); Miramontes v. Mills, 11-cv-8603 MMM, 2015 WL 7566491, at *6 (C.D. Cal. Nov. 24, 2015) appeal filed No. 15-56932 (9th Cir. Dec. 17, 2015). Hani filed his lawsuit on April 8, 2014. (Dkt. No. 1.) Thus, if Hani discovered or had reason to discover the fraud before April 8, 2011, Hani's claim is barred by the statute of limitations and this Court should grant Starbuzz's motion.

The Court previously held, on the basis of the complaint alone, that Hani's claim was not time-barred by the statute of limitations because Hani learned of facts that showed Starbuzz committed fraud in July 2011. (Prior Order 9–10.) The Court reconsiders this prior holding and determines that holding was limited to the level of proof applicable on Starbuzz's motion to dismiss. The uncontroverted proof on summary judgment instead now shows that the facts from which Hani would have had reason to discover the fraud claim arose—at the latest—upon nonperformance of the

[11] Hani's GMFID asserts, "Disputed as to time frame" to Starbuzz's assertion that "[t]he Manufacturing Equipment arrived by mid 2009 and was installed by around late 2009." But Hani's sole evidence to dispute this assertion is his own declaration. The declaration does not argue for any alternative date that the installation was completed and in fact states that in "*early* 2009" Hani made arrangements to build the equipment necessary for the production of Mu'assal tobacco at Starbuzz's facility in the United States. (Decl. Hani ¶ 25 (emphasis added).)

2005 Agreement "in or around 2009."

Courts determine the applicable date of notice using an objective standard. Miramontes, 2015 WL 7566491, at *7, citing In re Charles Schwab Corp. Sec. Litig., 257 F.R.D. 534, 556 (N.D. Cal. 2009). Hani claims he did not have the applicable notice until he allegedly demanded performance under the contract in 2011. (Decl. Hani ¶¶ 39, 41; Opp'n 26–27.) However, under the objective standard, it cannot be the law that the date of Starbuzz's rejection of Hani's purported demand for performance in 2011 is the applicable date of accrual of the fraud claim for purposes of the statute of limitations.

The applicable accrual date for this promissory fraud claim must be, at the latest, the date that Hani knew or should have known that Starbuzz did not intend to perform its obligations under the contract—not the date that Hani demanded performance. See Fox, 35 Cal. 4th at 807–08 quoting Gutierrrez v. Mofid, 39 Cal. 3d 892, 896–97 (2005) ("plaintiffs are charged with presumptive knowledge of an injury if they have 'information of circumstances to put [them] on inquiry'"). See also Miramontes, 2015 WL 7566491, at *7 (the date plaintiff forms a subjective belief that defendant made misrepresentations is not controlling). Using the objective standard, the Court holds that Hani was on inquiry notice of his fraud claim no later than the date of non-performance after Hani performed pursuant to Articles Eight and Eleven of the 2005 Agreement.

Consequently, if Starbuzz defrauded Hani, Hani is charged with inquiry notice of the claim—at the latest—when Starbuzz failed to perform after Hani's purportedly successful efforts to set up the equipment in Starbuzz's factory "in or around 2009." Because "in or around 2009" predates April 8, 2011, the uncontroverted evidence establishes that Hani's fraud claim is barred by the statute of limitations. Hani puts forth no evidence or argument that the statute of limitations was equitably tolled. Hani's claim that he never asked about his interest until 2011 because his performance under the contract was not completed until 2011 should not be credited because, as discussed above, this interpretation of the 2005 Agreement is an unreasonable one. In addition, while representations made after the statute of limitations has run can stand as proof of fraudulent intent in the 2005 representations, (see Section III. D, supra), they do not toll the statute where nonperformance was clear by uncontroverted evidence prior to the statute running.

Accordingly, Starbuzz is entitled to summary judgment on its twelfth affirmative

defense asserting the statute of limitations and is entitled to summary judgment on Hani's fraud claim.

IV. Conclusion

As discussed above, there are two independent and sufficient bases for the Court's conclusion that Starbuzz is entitled to summary judgment. First, Hani fails to present a triable issue of material fact on an issue on which Hani would bear the burden of trial on his breach of contract claim. See Celotex Corp., 477 U.S. at 325. Second, both of Hani's claims are time barred. See Cal. Civ. P. Code §§ 337, 338(d).

For the foregoing reasons, the Court grants Starbuzz's motion for summary judgment. Because this result concludes the case, the Court denies, without prejudice, the motion to bifurcate the trial. (Dkt. No. 80.)

IT IS SO ORDERED.

Counsel for defendant is directed to prepare, serve and submit, forthwith, a proposed judgment in conformance with this Court's order.

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