GIBSON, DUNN & CRUTCHER LLP
AUSTIN V. SCHWING (SBN 211696)
MATTHEW S. KAHN (SBN 261679)
LAUREN DANSEY (SBN 311886)
555 Mission Street
San Francisco, CA 94105
Tel. (415) 393-8200

Attorneys for Defendants
NEUTRON HOLDINGS, INC.
DAVID RICHTER
BRAD BAO
MICHAEL HILLMAN

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

KHOSLA VENTURES IV, L.P., a Delaware limited partnership, KHOSLA VENTURES IV (CF), L.P., a Delaware limited partnership,

Plaintiffs,

v.

NEUTRON HOLDINGS, INC., a Delaware corporation, DAVID RICHTER, an individual, BRAD BAO, an individual, and MICHAEL HILLMAN, an individual

Defendants.

CASE NO. CGC-20-584188

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRIKE CERTAIN REQUESTS FOR RELIEF FROM PLAINTIFFS' FIRST AMENDED COMPLAINT

[*Reply in Support of Lime's Demurrers and Reply in Support of Individual Defendants' Demurrers filed concurrently herewith*]

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I. INTRODUCTION

As demonstrated in Defendants' Motion to Strike, Lime's and the Individual Defendants' Demurrers, and Lime's and the Individual Defendants' Replies in Support of their Demurrers, the FAC fails to plead facts supporting any of Khosla's claims or its requests for punitive damages, injunctive relief, and restitution. Khosla's Opposition overstates the allegations contained in the FAC, which is devoid of any factual assertions supporting a conclusion that Defendants acted with oppression, fraud or malice. Moreover, the FAC itself shows legal damages are adequate, foreclosing any claim for injunctive relief. Finally, Khosla does not allege that Lime received any money or property from Khosla to return, and thus Khosla's request for restitution is improper. The Motion to Strike should be granted without leave to amend.

II. ARGUMENT

A. Khosla's Request For Punitive Damages Should Be Stricken Because Khosla Fails To Plead Facts Supporting Such Relief.

Khosla's request for punitive damages fails for numerous independent reasons, as demonstrated in Defendants' Motion to Strike. (Mot. to Strike at 7–11.)

First, Khosla has failed to adequately plead, among other claims, the underlying causes of action for which it seeks punitive damages, as shown in Defendants' Demurrers and Replies in support thereof. Khosla is only able to allege unremarkable business conduct in the form of unsuccessful business negotiations in a competitive industry, and is reduced to pleading intent, malice, and oppression through insufficient legal conclusions or on "information and belief." (See, e.g., FAC ¶¶ 48, 58, 67, 81.) Because each of its causes of action independently fails (see Individ. Dem. at 7–10; Lime Dem. at 9–23), so too must the allegations of punitive damages derived from them. (*Grieves v. Super. Ct.* (1984) 157 Cal.App.3d 159, 164; *Berkley v. Dowd* (2007) 152 Cal.App.4th 518, 524, 535.)

Second, even if Khosla's claims could survive demurrer, its requests for punitive damages nonetheless must be stricken because Khosla has failed to allege particular facts supporting such relief. (Mot. to Strike at 8–9.) Khosla incorrectly contends that the FAC's conclusory allegations sufficiently allege "ultimate facts" that meet its pleading burden. (Opp. at 2 [citing *Clauson v. Super.*

Ct. (1998) 67 Cal.App.4th 1253, 1255 and *Blegen v. Super. Ct.* (1981) 125 Cal.App.3d 959, 963.) In fact, to meet "California's heightened pleading standard" for punitive damages (*Taheny v. Wells Fargo Bank, N.A*. (E.D.Cal. Apr. 18, 2011) 2011 WL 1466944, at *4), "vague, conclusory allegations of fraud or falsity" cannot survive a motion to strike (*G.D. Searle & Co. v. Super. Ct.* (1975) 49 Cal.App.3d 22, 29) because a "conclusory characterization of defendant's conduct as intentional, willful and fraudulent" is "patently insufficient." (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.) Indeed, both cases Khosla cites confirm that pleading "ultimate facts" requires *more* than the bare recitation of the words "willful," "fraudulent," "oppressive" or "malicious," as "the terms themselves are conclusory." (See *Blegen*, *supra*, 125 Cal.App.3d at p. 963 [holding plaintiff pleaded sufficient facts indicating defendant's "deliberate course of conduct . . . which prolonged petitioner's suffering and increased his physical damage for the purpose of concealing Dunbar's liability for malpractice"]; *Clauson*, *supra*, 67 Cal.App.4th at p. 1255 [holding plaintiff pleaded sufficient facts where complaint described wiretapping operation and "conversations that were tape-recorded involv[ing] 'confidential communications, including private family matters'"].)

Khosla does not come close to satisfying the strict requirements of Civil Code section 3294. Rather, Khosla merely and insufficiently alleges "[o]n information and belief" the legal conclusion that Defendants acted "oppressively and maliciously." (FAC ¶¶ 48, 58, 67, 81.) Where "[t]he sole basis for seeking punitive damages" is "conclusory allegations . . . devoid of any factual assertions supporting a conclusion [defendants] acted with oppression, fraud or malice," a request for punitive damages must be stricken. (*Smith v. Super. Ct.* (1992) 10 Cal.App.4th 1033, 1042.)

While Khosla contends the FAC pleads "fraudulent and oppressive acts" that "create a strong inference that Defendants made these misrepresentations with an intent to deceive" (Opp. at 2–3), even a cursory examination of the FAC puts the lie to this assertion. Instead, Khosla's FAC contains nothing more than "opaque, unstable and compound averments," based "[o]n information and belief," which cannot form the factual basis for a punitive damages award. (*G.D. Searle*, *supra*, 49 Cal.App.3d at p. 27.) Indeed, the FAC fails even to identify the contents of any allegedly misleading statements, or what was allegedly misleading about them. (*Lazar v. Super. Ct.* (1996) 12 Cal.4th 631, 638 [outlining requirements for pleading fraud].) Khosla likewise fails to allege any facts showing

that any alleged misrepresentations were knowingly false when made, as opposed to Lime simply changing its negotiation positions over time when Khosla and Boosted altered the terms of the proposed deal, as the FAC concedes occurred. (Lime Dem. at 21.) Khosla alleges that Defendants Bao and Richter gave a presentation that "substantially overvalued the Lime common stock that Lime was to use as consideration in the transaction." (FAC ¶ 13.) However, Khosla does not allege what they supposedly said or how it was false. This is particularly important because Lime is a private company, so there is no public market to set the valuation of the company and its stock. The mere fact that Bao and Ricther may have believed the company to be worth more than Khosla believes is not a false statement. Nor is there any allegation that they knew the presentation regarding Lime's stock was knowingly false when made (see FAC ¶¶ 13, 72), as discussed further in Lime's Demurrer Reply. (Lime Dem. Reply at 12.)

Nor does the FAC "adequately [allege] that Defendants acted with malice by intending to cause injury to Boosted's economic relationship with Manufacturer," as Khosla inaccurately asserts. (Opp. at 3.) As Lime's Demurrers and Reply make clear, Khosla fails to plead Defendants even knew any details about Boosted's supposed "economic relationship with Manufacturer," much less that they intended to "injur[e]" it or, or that they did injure it. (Lime Dem. at 18; Lime Dem. Reply at 10.) All the FAC alleges is that Khosla was "suspicious" that Lime may have learned some unidentified information about "how the deal was progressing" between Manufacturer and Boosted from Defendant Hillman (FAC ¶¶ 27–28), but it does not allege that Lime did anything with that unidentified information to disrupt a potential deal, let alone acted in a way that would authorize punitive damages. To the contrary, the FAC concedes Manufacturer unilaterally withdrew from negotiations because it simply was not interested in a deal with Boosted, not because of anything Defendants did. (Lime Dem. at 16–17 [citing Original Compl. ¶ 28]; Lime Dem. Reply at 6, 9.) Khosla's Opposition completely ignores this fatal admission, as well as Khosla's unavailing attempt to delete it from the record when it amended the Complaint. (Dem. at 11.)

Ultimately, Khosla merely alleges a failed business negotiation and the hiring of at-will employees from a dying business that was planning to terminate its employees. It does not allege, nor could it, that Defendants intentionally harmed Khosla or Boosted, or that Defendants acted

despicably, deceitfully, or in conscious disregard of the rights and safety of others, as required by Civil Code section 3294. The request for punitive damages must be stricken.

Third, Khosla fails to plead any connection between its request for punitive damages from Lime and any particular individual's conduct, as it must to seek punitive damages from Lime. (Mot. to Strike at 9–11.) The FAC mentions only three Lime personnel: Defendants Richter, Bao, and Hillman. But as demonstrated in the Individual Defendants' Demurrers and Reply, the FAC fails to plead any facts suggesting that Richter, Bao, or Hillman engaged in any malicious, oppressive or fraudulent acts. (Individ. Dem. at 8–10; Individ. Dem. Reply at 4–8.)

Moreover, as Vice President of Hardware at Lime (FAC ¶ 10), Hillman is not an "officer[], director[] or managing agent[]" because he is not alleged to "exercise [ ] substantial discretionary authority over decisions that ultimately determine corporate policy." (*Cruz. v. HomeBase* (2000) 83 Cal.App.4th 160, 167 [citation omitted].) Khosla does not dispute in its Opposition that Hillman is not an officer. (Opp. at 4.) And while Khosla claims that the FAC "identifies two Lime officers . . . who were responsible for the wrongful conduct," as the Individual Defendants' Demurrer Reply demonstrates (Individ. Dem. Reply at 4–7), the FAC does not plead any facts showing either Richter or Bao ever authorized, ratified, or committed any wrongful act, much less that they did so with oppression, fraud, or malice. (See *Cardenas v. Am. Airlines, Inc.* (S.D.Cal. Apr. 26, 2018) 2018 WL 1963787 at *4 [punitive damages require allegations of "malice among the corporate leaders"].) The case Khosla cites to suggest a person's role as "managing agent" is sufficient for an award of punitive damages does not support its argument. In that case, there was no doubt as to the actor's malicious conduct—the question turned simply on whether the malicious actor was a managing agent or not. (*Wysinger v. Auto. Club of S. California* (2007) 157 Cal.App.4th 413, 428 [noting callous and retaliatory conduct by Kane including statements to plaintiff that he would "crush the managers opposed to the plan . . . you can die at your desk. We'll replace you tomorrow. Nobody cares."].) Khosla pleads no such facts indicating malicious conduct. The punitive damages prayer must be stricken.

B. The Request For Injunctive Relief Should Be Stricken Because It Is Only Available Where Monetary Damages Are Inadequate.

Khosla's conclusory allegation that "[a]s a result of Defendants' fraudulent and unlawful and [sic] conduct, Plaintiffs have suffered irreparable injury" (FAC ¶ 90) is insufficient under California law to obtain injunctive relief. Injunctive relief is only "available to restrain unjustified interference with contractual relations when damages would not afford an adequate remedy." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1130 fn. 9; see also, e.g., *Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352.)

Khosla makes only one argument in Opposition. Relying on *ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006 (*ReadyLink*), Khosla claims injunctive relief is available because the FAC alleges theft and ongoing use of trade secrets and confidential information. (Opp. at 5). Not so.

First, as explained in the Demurrers and Replies, Khosla does not adequately plead trade secret misappropriation or ongoing wrongful use of confidential information. (Lime Dem. at 15–16; Lime Dem. Reply at 7–10.)

Second, *ReadyLink* is easily distinguishable—it involved a suit against a former employee who signed an NDA regarding "maintaining confidentiality and nondisclosure of Readylink's proprietary information, including Readylink trade secrets." (*ReadyLink*, *supra*, Cal.App.4th at 1012.) Khosla nowhere alleges that Defendants signed or are violating an NDA, nor could it. Moreover, the defendant in *ReadyLink* "*admitted* he misappropriated proprietary and confidential information . . . and that disclosure of such information violated local, state, and federal law." (*Id.* at 1018, italics added.) Defendants make no such admission here.

Third, Khosla has not explained, nor can it, why *Khosla* allegedly is being irreparably harmed by Lime's purported ongoing use of *Boosted's* supposed trade secrets or confidential information. In the usual trade secrets case, the company suing is the same one whose information is allegedly being improperly used. But that is not the case here, and Khosla has not articulated why or how Lime's alleged use of Boosted's trade secrets or confidential information causes Khosla any ongoing harm that cannot be addressed by damages.

Finally, the supposed "trade secret" and "confidential" information was Boosted's ranking of employees that Lime allegedly used to consider whether to hire employees (FAC ¶ 27), but there is no allegation that Lime is *still* using Boosted's ranking of employees now that those employees have been Lime's employees for the better part of one year. There is no basis for injunctive relief.

C. The Court Should Strike Khosla's Improper Request For Restitution.

Khosla does not—and cannot—allege that Lime received any money or property from Khosla to return, and thus Khosla's request for restitution should be stricken. (Mot. to Strike at 11–12 [citing *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1141].)

Khosla's only response is to claim it has an interest in Boosted's proprietary business information, Boosted's employees hired by Lime, and Boosted's assets purchased at the foreclosure sale. (Opp. at 6.) But leaving aside the substantive failure of these allegation as demonstrated in the Demurrers and Replies, this still fails to support a request for restitution, because restitution is limited to *money*. As in *Korea Supply*, "[t]he recovery requested in this case cannot be traced to any particular *funds* in [Defendants'] possession and therefore is not the proper subject of" restitution. (*supra*, 29 Cal.4th at p. 1150, emphasis added.) Also as in *Korea Supply*, Khosla's "expectancy in this case is further attenuated since [Khosla] never anticipated payment directly from [Lime]." (*Ibid.*) Instead, it expected *Boosted* to "repay the loans." (FAC ¶ 12.) As a result, "[t]he monetary relief requested by [Khosla] does not represent a quantifiable sum owed by [Defendants] to [it]. Instead, it is a contingent expectancy of payment from a third party [*i.e.*, Boosted]." (*Ibid.*) Khosla notably cites no cases in support of its argument, nor could it. The FAC's prayer for restitution should be stricken.

D. The Motion To Strike Should Be Granted Without Leave To Amend.

As described in Defendants' Motion to Strike, an opportunity to further amend would be futile in view of Khosla's inability to address these very issues previously raised by Defendants prior to the filing of the instant motion. (Mot. to Strike at 12.) Accordingly, the motion should be granted without leave to amend. While Khosla cites *Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298 for the proposition that the Court should not "penalize Plaintiffs for conferring" (Opp. at 6), *Johnson*—which long predates the recently enacted pre-motion meet-and-confer requirement—says nothing of the sort. *Johnson* states that leave to amend should be granted where "a fair prior opportunity to

correct the substantive defect *has not been given*." (*Johnson*, *supra*, 143 Cal.App.3d at p. 306, emphasis added.) Here, Khosla has "been given" more than a fair prior opportunity to correct the substantive defects in the FAC, as Defendants twice raised these defects with them when conferring. Defendants' Motion to Strike should be granted without leave to amend.

III. CONCLUSION

For all of the foregoing reasons, Khosla may not seek punitive damages, injunctive relief, or restitution.

DATED: October 21, 2020

GIBSON, DUNN & CRUTCHER LLP
AUSTIN V. SCHWING
MATTHEW S. KAHN
LAUREN DANSEY

By: /s/ Austin V. Schwing
Austin V. Schwing

Attorneys for Defendants Neutron Holdings, Inc., David Richter, Brad Bao, and Michael Hillman